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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HERBERT LITTLES,

Petitioner,

v.

JEFFERSON SMURFIT CORPORATION (U.S.),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

(1) Do sections 1981 and 1982 of 42 U.S.C. forbid the knowing use of practices which, by perpetuating past intentional discrimination, completely preclude all African-American entrepreneurs and black-owned firms from selling timber to scores of southern pulp and paper mills?

(2) Where a defendant is alleged to maintain, for discriminatory purposes, practices which perpetuate past intentional discrimination, may a plaintiff be precluded from offering evidence that such earlier intentional discrimination ever occurred?

Parties

The parties are the petitioner, Herbert Littles, and the respondent, Jefferson Smurfit Corporation (U.S.). Subsequent to the initiation of this action, the original defendant, Container Corporation of America, merged with another firm and changed its corporate name to Jefferson Smurfit Corporation (U.S.). Jefferson Smurfit Corporation (U.S.) is a wholly owned subsidiary of the Jefferson Smurfit Group, PLC.

Table of Contents

Page

Questions Presented i

Parties ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement of the Case 3

REASONS FOR GRANTING THE WRIT 9

I. This Case Raises Important Issues Regarding Industry-Wide Segregation In A Vital Area Of The South's Economy 9

II. The Decisions Below Are In Conflict With Decisions Of This Court And Of Other Circuits 16

Conclusion 22

Appendix (opinions and orders below) 1a

Table of Authorities

Page

Cases:

Adarand Constructors, Inc. v. Peña, ___ U.S. ___, 115 S. Ct. 2097 (1995) 22

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) . . . 13

Associated General Contractors v. City of Jacksonville, ___ U.S. ___, 113 S. Ct. 2297 (1993) 22

Bazemore v. Friday, 478 U.S. 385 (1986) 8, 16, 17, 18

Brinkley-Obu v. Hughes Training, Inc., 36 F.2d 336 (4th Cir. 1994) 18, 19

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 9, 19, 22

Columbus Board of Educ. v. Penick, 443 U.S. 449 (1979) 19

Dixon v. Anderson, 928 F.2d 212 (6th Cir. 1991) 18

EEOC v Penton Industrial Publishing Co., Inc., 851 F.2d 835 (6th Cir. 1988) 18

EEOC v. Container Corporation of America, 352 F. Supp. 262 (M.D. Fla. 1972) 13

Florida v. Long, 487 U.S. 223 (1988) 17

Fullilove v. Klutznick, 448 U.S. 448 (1980) 22

Table of Authorities (continued)

Page

Cases (continued):

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) ... 19

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 17

Guinn v. United States, 238 U.S. 347 (1915) 20, 21

Harrington v. Aetna-Bearing Co., 921 F.2d 717 (7th Cir. 1991) 18

Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) 13

Louisiana v. United States, 380 U.S. 145 (1965) 19

Myers v. Anderson, 238 U.S. 368 (1915) 21

Nealon v. Stone, 958 F.2d 584 (4th Cir. 1992) 18

Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) 13

Pallas v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991) 18, 19

Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975) 13

Sigurdson v. Isanti County, 448 N.W.2d 62 (Minn. 1989) 18, 19

Table of Authorities (continued)

Page

Cases (continued):

Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975) 13

Suggs v. Container Corporation, Civ. No. 7058-72-P (S.D. Ala. 1974) 13

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1974) 19

United States v. Fordice, 505 U.S. ___, 112 S. Ct. 2727 (1992) 20

Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976) 13

Webb v. Indiana National Bank, 931 F.2d 434 (7th Cir. 1991) 18

West Virginia Institute of Technology v. West Virginia Human Rights Commission, 383 S.E.2d 490 (W. Va. 1989) 18, 19

Statutes:

42 U.S.C. § 1981 14

42 U.S.C. §§ 1981, 1982 ..... i, 2, 3, 5, 7, 16, 17

42 U.S.C. §1982 ..... 2, 7, 14

Table of Authorities (continued)

Page

Other Authorities:

Alabama Forestry Commission, *Alabama's World Class Forest Resource Fact Book 1995* (1995) 10

Alabama Forestry Commission, *Forests of Alabama* (1992) 11

The Brewton Standard, July 31, 1994 11

The Brewton Standard, June 30, 1993 11

Federal Reserve Bank of Atlanta, *Economic Review*, Jan./Feb. 1988 ..... 10, 11

Edward McPherson, *The Political History of the United States During the Period of Reconstruction* (1875) 14

U.S. Department of Agriculture, *Agricultural Statistics 1993* (1993) 10

U.S. Department of Commerce, *State and Metropolitan Area Data Book 1991* (1991) 10

Laurence C. Walker, *The Southern Forest: A Chronicle* (1991) 9, 10

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No. 95-

HERBERT LITTLES,
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v.

JEFFERSON SMURFIT CORPORATION (U.S.),
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Herbert Littles respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 28, 1995. The Court of Appeals denied a timely petition for rehearing on June 13, 1995.

Opinions Below

The opinion of the Eleventh Circuit, which is not officially reported, is set out at pp. 1a-2a of the Appendix hereto ("App."). The order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc is unreported, and is set out in App. 48a-49a.

The order of the district court of April 30, 1992, denying class certification, is set out at App. 3a-11a. The opinion and order of the district court of March 3, 1992, denying cross motions for summary judgment, are set out at App. 12a-27a. The two district court orders regarding

motions in limine, both dated August 23, 1993, are set out at App. 28a-33a and 34a-36a. The district court's oral rulings on the admissibility of certain evidence are set out at App. 37a-41a. The jury verdict is set out at App. 42a-43a. The district court's order of December 1, 1993, denying petitioner's motion for equitable relief, is set out at App. 44a-45a. The district court order of February 10, 1994, denying petitioner's motion for judgment as a matter of law, is set out at App. 47a. None of the district court orders is officially reported.

Jurisdiction

The decision of the Eleventh Circuit was entered on March 28, 1995. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on June 13, 1995. On September 9, 1995, Justice Kennedy granted an order extending the time for filing a petition for a writ of certiorari until September 21, 1995.

Statutes Involved

Section 1981(a) of 42 U.S.C. provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

Section 1981(c) of 42 U.S.C., provides:

> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Section 1982 of 42 U.S.C. provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by

white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Statement of the Case

This case concerns a practice peculiar to the southern forest products industry pursuant to which scores of pulp and paper mills will buy timber only from whites. The courts below held that this practice, despite its enormous economic impact, does not violate 42 U.S.C. §§ 1981 and 1982, even where a mill operator knows the practice perpetuates its own intentional discrimination.

Most southern pulp and paper mills purchase their timber supplies, known as "pulpwood," as does respondent, through a system of exclusive "dealers." Under this dealership system a mill designates a pre-selected group of firms as its "dealers" and refuses to buy lumber from anyone else. The dealers themselves may not necessarily cut, deliver or own all or even any of the timber they "sell" to the mill. Rather, because the dealers enjoy this exclusive right, any firm which wants to supply wood to the mill must do so under the auspices of a dealer and must pay the dealer for permission to deliver wood to the mill. Firms which cut and haul timber to these mills, but which have not been designated as dealers, are known in the industry as "producers."

It is undisputed that today literally all of the dealers throughout the South are white. In the proceedings below respondent so stipulated:

> [Counsel for Petitioners]: We are . . . going . . . to show that there are no black dealers anywhere . . . The fact is that nobody has found, either on our side or the defendant's side, throughout the case a single black wood dealer anywhere in the south.

> THE COURT: [I]f it's relevant that there are no black wood dealers anybody knows of in any industry, you don't need a witness to prove it. . . . You can ask any Container witnesses on the stand on cross . . . .
>
> [Counsel for Respondent]: It is a stipulated fact, Judge.
>
> THE COURT: Okay. Then that eliminates that.

(Tr. 41). A succession of white wood dealers and others testified that there are in fact no black wood dealers.[1] Respondent's forestry expert acknowledged that use of this "dealer" system is widespread in the South.[2]

Respondent operates in Brewton, Alabama, one of the mills utilizing this dealer system. It buys pulpwood exclusively from a group of approximately forty "dealers," all of whom are white (App. 5a). Petitioner is one of the African-American producers with whom respondent refuses to contract. Although petitioner has been supplying

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[1]Tr. 365-66, 578, 673, 689, 705, 840. An expert on the lumber industry called by respondent could identify in the entire history of the South only one black businessman who had ever been a dealer. The expert explained that this had occurred in the "[l]ate sixties, early seventies . . . under the pressure of the Federal Government" and that the black logger in question had actually functioned as a dealer for only "about six or seven weeks" (Tr. 782). The expert conceded he knew of no black dealers "in Alabama today" (Tr. 780). After initially suggesting there might be a black dealer in South Carolina, the expert conceded that the individual in question might merely have been hired to cut timber on land owned by the mill for which he worked (Tr. 780-81); such an arrangement would not constitute a dealership (Tr. 780).

[2]Tr. 763 ("[t]he vast majority of the industry procures their wood through . . . the dealer systems"), 771 ("[t]he vast majority . . . of all the wood that's produced in the south is through the dealer . . . system").

pulpwood regularly to respondent's Brewton mill since 1962, petitioner himself never has been permitted to sell the mill so much as a single log. Instead, petitioner has been forced to market his wood to respondent by going through a white dealer willing to lend his name to the transaction.[3] The economic role of the white dealer, in petitioner's case, is nominal. Petitioner himself buys the standing timber, employs his own crew to cut the trees, and transports the logs to the mill on his own trucks (Tr. 192). The white dealer never has possession of or title to the wood, never actually sees it, and has no reason to know where or when it was harvested (Tr. 151-52). Petitioner is required to pay white dealers tens of thousands of dollars a year for permission to sell wood under their auspices.[4]

Petitioner filed suit in the district court for the Southern District of Alabama, seeking an injunction requiring that he be designated as a dealer, as well as damages. Petitioner asserted, inter alia, that by utilizing its particular dealer system, respondent was knowingly perpetuating prior intentional racial discrimination. His complaint asserted that such perpetuation violates sections 1981 and 1982 of 42 U.S.C.[5]

Petitioner alleged that respondent's practices perpetuated prior intentional discrimination in two distinct ways. First, at some point prior to 1979 respondent concededly froze the list of dealers with whom it would

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[3]As one of respondent's supervisors pointedly observed, "[h]e has to sell it to a white man who sells it to Container" (Tr. 111).

[4]Petitioner pays a dealer a commission of $2.00 to $6.50 per cord of wood delivered to the mill, or as much as $60.00 for each truck load (Tr. 200-01).

[5]Amended Complaint, ¶¶ 22A, 22B.

thereafter do business (Tr. 442, 464, 578). As of 1979, of course, all of respondent's dealers were white. Petitioner alleged that prior to 1979 respondent had an intentionally discriminatory policy of selecting only whites as dealers. The courts below never addressed that contention, which for the purposes of this appeal must be assumed to be true.[6] Because of this freeze, many of the firms today permitted to sell wood to respondent are the very firms which were designated as dealers prior to 1979.[7] Increasingly, the individuals who own and operate respondent's dealerships are the sons of the white men who were designated dealers during the period of alleged avowed intentional discrimination.[8] This system thus perpetuates into the indefinite future decisions originally made prior to 1979, allegedly on the basis of race, limiting the firms from which respondent will buy wood.[9]

Petitioner asserted, second, that on those occasions since 1978 when respondent had made an exception to the freeze and contracted with a new dealer, respondent would consider only firms which had already been designated as dealers by some other mill, a restriction respondent admitted (Tr. 284, 442, 548). All of the firms able to meet this

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[6]Respondent's Answer did not deny it had once practiced racial segregation at its Brewton mill; it only denied racial discrimination "during any time period relevant to this lawsuit." Answer ¶ 3.

[7]Tr. 445, 446-47, 560, 598, 599.

[8]Tr. 548 (ownership of current dealerships often comes "[t]hrough inheritance. Many times a son will come into an operation that his father had previously been operating [as] a dealership and his son will take over the business"), 848.

[9]Although the firms that held these dealerships were occasionally sold privately, none was ever sold to a black person.

requirement, of course, are -- and always have been -- white (see App. 5a); five new dealers added since 1979 were white. Petitioner alleged that respondent knew that the other mills in question engaged in intentional discrimination in designating these dealers; here too the courts below did not address or resolve this factual allegation. Firms thus occasionally added to respondent's list of dealers were usually owned by whites who had been doing business as dealers for decades,[10] or by their children.[11]

The district court repeatedly held that these claims of knowing perpetuation of prior intentional discrimination were not actionable under either section 1981 or section 1982. First, in response to motions for summary judgment, the district court ruled that the perpetuation allegations failed to state a claim upon which relief could be granted.

> [T]he legal claims raised are not relevant in the instant action. . . . [P]laintiff . . . may not proceed on the theory that the adoption of policies that unintentionally "lock in" past discrimination are sufficient to prove his cause of action under either § 1981 or § 1982.

(App. 26a n.5). Second, after a jury trial on other issues, petitioner filed a motion for equitable relief on his perpetuation claims. The district court denied these claims as a matter of law, reasoning that "the legal arguments raised by plaintiff in support of the claims have been previously rejected by this Court" (App. 44a). Third, the district court denied petitioner's post-trial motion for

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[10]Tr. 663 (firm had held dealership with another mill since 1968), 710-11 (firm had held dealership with another mill since 1964), 684 (firm had held dealership with another mill since 1950).

[11]Tr. 685.

judgment as a matter of law on the perpetuation claims (App. 47a).

Petitioner was permitted to proceed to trial only on the narrow issue of whether after October, 1989, respondent's officials had made a specific race-based decision to deny petitioner a dealership. The district court granted two motions in limine precluding respondent from offering evidence of historic discrimination in the selection of dealers (App. 28a-36a). The court below continued to preclude such evidence even after, as a supposedly benign explanation for its actions, respondent relied on the fact that there were no black wood dealers (Tr. 279-289; App. 37a-41a). The district court rejected instructions proffered by petitioner which would have permitted the jury to consider the perpetuation claims.

Petitioner argued below that the decisions of this Court have repeatedly held unlawful the knowing use of practices which perpetuate prior intentional discrimination. Acknowledging that the Court had so held in *Bazemore v. Friday*, 478 U.S. 385 (1986), the district court insisted that *Bazemore* applied only to disparate *impact* claims: "*Bazemore* . . . addressed the use of prior act evidence to prove disparate impact under Title VII. Intent was not an issue" (App. 30a). Because sections 1981 and 1982 require proof of discriminatory intent, the court below reasoned, *Bazemore* was irrelevant.

On appeal petitioner argued that sections 1981 and 1982 forbid utilization of practices known to perpetuate prior intentional discrimination. The court of appeals, in a summary opinion devoid of explanation, affirmed the dismissal of the perpetuation claims (App. 1a-2a, 48a-49a).

REASONS FOR GRANTING THE WRIT

I. This Case Raises Important Issues Regarding Industry-Wide Segregation In A Vital Area Of The South's Economy

Six years ago this Court observed that "the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). The Court noted as well the existence of "abundant historical evidence" that facially neutral practices "when applied to minority businesses, could perpetuate the effects of prior discrimination." 488 U.S. at 488, *quoting Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980). The legal question presented by this case is whether firms which long engaged in intentional discrimination against black entrepreneurs may continue to contract only with whites by adopting practices which perpetuate that past intentional discrimination.

The practical question presented is whether a key portion of the most important industry in the economy of the South will continue for the indefinite future to be literally all white. The wood products industry is today the backbone of the economies of the southern states. What was once the land of cotton is now the land of timber. The value of southern timber harvested each year long ago exceeded the value of any other agricultural crop. In Alabama the value of the timber harvest equals the *combined* value of all other crops grown in the state.[12] Southern states account for 58% of all the timber produced each year in the United States, more than twice the

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[12]LAURENCE C. WALKER, THE SOUTHERN FOREST: A CHRONICLE 251-52 (1991).

production of the Pacific Coast states.[13] Among the states with the highest percentage of jobs in the wood products industry, half are in southern states, including Alabama.[14] Sixty-six percent of all Alabama land is devoted to forests with 15 billion trees, compared with only 29% for the country as a whole.[15]

The pivotal role of the southern timber industry is certain to increase in the years ahead. Sixty-six percent of all new seedlings planted in the United States each year are in the South; Alabama, with 10% of the total new acreage, is second in the country.[16] Southern states enjoy a natural advantage in timber production, because "the southern climate promotes faster tree growth and thus a better per-acre return over time."[17] The percentage of wood production coming from the South is expected to rise as the supplies of virgin timber are exhausted in northern California and the Pacific Northwest.[18]

The timber industry is particularly important in Alabama. The state is the second largest pulpwood

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[13]U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL STATISTICS 1993 445 (1993).

[14]U.S. DEPARTMENT OF COMMERCE, STATE AND METROPOLITAN AREA DATA BOOK 1991 267 (1991).

[15]FEDERAL RESERVE BANK OF ATLANTA, ECONOMIC REVIEW, Jan./Feb. 1988, at 9; ALABAMA FORESTRY COMMISSION, ALABAMA'S WORLD CLASS FOREST RESOURCE FACT BOOK 1995 3 (1995).

[16]AGRICULTURAL STATISTICS 1993, *supra* note 13, at 443.

[17]ECONOMIC REVIEW, *supra* note 15, at 12.

[18]THE SOUTHERN FOREST: A CHRONICLE, at 232.

producer in the U.S., behind only Georgia.[19] The state's 22 million acres of commercial forest are third in the country.[20] The $9.1 billion[21] wood products industry accounts for 18% of manufacturing payrolls in Alabama, more than any other segment of the state's economy.[22] The state's 250 mills and 800 secondary wood product manufacturers[23] support, directly or indirectly, more than 150,000 jobs with a related income of approximately $3 billion.[24]

But, three decades after Congress restated a national policy of racial non-discrimination, an entire segment of this industry -- wood dealers -- remains all white. The sheer number of businesses involved, and thus the magnitude of the economic opportunities foreclosed to blacks, makes this continuing segregation palpably important. Systemic exclusion of blacks from the dealership business is all the more significant because the harvesting of timber is one of the few areas of the industry available for new small entrepreneurs. The lumber and paper mills themselves are generally multi-million dollar facilities, often, as in this case, owned by large multinational corporations. Because of the time required for trees to reach maturity, ownership of timber land is a capital-intensive, long-term investment. But

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[19]ECONOMIC REVIEW, *supra* note 15, at 8.

[20]THE BREWTON STANDARD, July 31, 1994, at 10.

[21]ALABAMA FORESTRY COMMISSION, FORESTS OF ALABAMA 14 (1992).

[22]THE BREWTON STANDARD, June 30, 1993, at 11.

[23]FORESTS OF ALABAMA, at 14.

[24]*Id.*

a black entrepreneur, whatever his or her expertise, experience or determination, has virtually no chance to reach the coveted status of wood dealer. The white monopoly of economic power in the dealer business manifestly has broader racial and economic ramifications; petitioner asserted in the court below, for example, that the number of black producers in Brewton has declined because the white dealers, who alone determine who can sell to respondent and at what price, have intentionally squeezed black loggers out of business.

The allegations in this case describe a system at the mill in question which assures with almost mathematical precision that the mill's dealers will remain all white in perpetuity. Respondent's annually renewed dealer contracts have long been limited to the dealers designated in years before, a scheme which reaches back through a chain of annual dealership contracts to an era prior to 1979, when respondent allegedly pursued an explicitly discriminatory policy. If an additional dealer is needed, respondent will consider only those firms -- all white-owned -- that have previously been designated as dealers by some other mill. Ownership of the firms holding these prized dealerships is increasingly being passed on by inheritance to the children of the men who decades ago were the beneficiaries of alleged systemic segregation.

Petitioner asserts that respondent's practices perpetuate not some amorphous societal discrimination but specific acts of discrimination by respondent and other southern mills taken, as respondent well knew, to assure that all wood dealers were white. This dealer selection scheme is the economic equivalent of the infamous grandfather clause.

That this systemic exclusion of black-owned firms has occurred in the timber industry is not surprising. Paper mills, the single largest purchaser of southern timber, were

among the most recalcitrant practitioners of racial segregation. Successful employment discrimination cases against the pulp and paper segment of the industry are legion.[25] Challenges to racially segregated jobs at respondent's own mills in Brewton and Fernandina Beach, Florida, were resolved by settlements which fundamentally restructured their promotion processes.[26] The complete exclusion of blacks from the role of wood dealer in the South reflects as well the structure of the industry. In other areas of economic activity, such as retail sales, there are numerous potential buyers, many of them black, a circumstance which prevents total exclusion of black entrepreneurs. But in the wood products industry, the pulpwood harvested by tens of thousands of loggers working for numerous producers can be sold only to a limited number of mills. Equally important, because transporting raw timber more than 50 miles is often economically unfeasible, a single mill may dominate timber production in a given area. Respondent's Brewton mill, for example, is the only paper mill in Escambia County, Alabama, where petitioner harvests timber.

These circumstances in the southern timber industry are expressly prohibited by the language of sections 1981 and 1982. In that industry, all persons do not "have the same

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[25]*E.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976); *Stevenson v. International Paper Co.*, 516 F.2d 103 (5th Cir. 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975); *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

[26]*Suggs v. Container Corporation*, Civ. No. 7058-72-P (S.D. Ala. 1974). *See EEOC v. Container Corporation of America*, 352 F. Supp. 262 (M.D. Fla. 1972).

right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. On the contrary, the only persons who can make contracts to sell wood to the mills in question are whites. Similarly, "[a]ll citizens" do not "have the same right . . . as is enjoyed by white citizens . . . to . . . sell . . . and convey . . . personal property." 42 U.S.C. § 1982. Only white persons have the right to sell timber to the southern mills using the dealer system. The problem here is not that petitioner's request for a dealership is being considered and rejected on the merits; rather, respondent's system assures that petitioner will never even be considered for one of its dealer contracts.

The racial structure of this industry is a pristine illustration of the very abuse sections 1981 and 1982 were created to end. The 1866 Civil Rights Act was adopted to make good the promise of the Thirteenth Amendment by removing obstacles which prevented the newly freed slaves from escaping a role of economic subservience to whites. The infamous Black Codes included provisions, calculated to perpetuate that subservience, which precluded blacks from selling the goods they had produced on the open market.[27]

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[27]For example, South Carolina law provided that any "person of color" employed on a farm "shall not have the right to sell any corn, rice, peas, wheat, or other grain, any flour, cotton, fodder, hay, bacon, fresh meat of any kind, [or] poultry of any kind" without written permission of his "master" or a state judge. EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 35 (1875). Another law in that state provided that "no person of color shall pursue or practice the art, trade, or business of an artisan, mechanic, or shopkeeper, or any other trade, employment or business (besides that of husbandry, or that of a servant under a contract for service or labor)," unless he or she obtained a license from a state judge and paid in advance a prohibitive annual fee of $100. *id.* at 36. North Carolina law invalidated any contract by a person of color for the sale "of any horse, mule, ass, jennet, neat cattle, hog, sheep or goat," or of any

The guarantee now contained in section 1982 of the right to "purchase, lease, hold, and convey real and personal property" was framed above all to enable African Americans to participate in the free enterprise economy in their own right, rather than merely as employees of or under the auspices of whites.

Thus the issue presented by this case is of decisive importance for the economic and racial structure of the southern timber industry. The circumstances of this case present a particularly compelling claim. Petitioner has been supplying timber to respondent's mill for more than three decades without ever being permitted to sell his goods directly to the mill, even though petitioner buys all his wood from landowners and performs all the functions of a dealer. The dealer selection policy respondent now has in place guarantees that this situation is unlikely ever to change. Because wood dealers are independent contractors, not employees, Title VII is inapplicable. Sections 1981 and 1982 are the only federal laws that could be invoked to end the total exclusion of blacks from this pivotal role in the industry. If, as the courts below held, allegations of such knowing perpetuation of intentional discrimination are never actionable under sections 1981 and 1982, the exclusionary dealer system will be immune from judicial scrutiny, and the wood dealers in Brewton and throughout the South are likely to remain all white for generations to come.

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articles worth more than $10, "unless . . . witnessed by a white person." *Id.* at 29. Several Louisiana parishes adopted ordinances simply directing, "Every negro is required to be in the regular service of some white person." WALTER FLEMING, 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 280 (1966 ed.) (1906).

II. The Decisions Below Are In Conflict With Decisions Of This Court And Of Other Circuits

The courts below held that an allegation of knowing perpetuation of past intentional discrimination does not state a claim under sections 1981 and 1982. The decisions below are flatly inconsistent with reported decisions of this Court and of the other courts of appeals

(1) The lower court acknowledged that the allegations in the instant case would state a "compelling" claim if *Bazemore v. Friday*, 478 U.S. 385 (1986) applied to claims under sections 1981 and 1982 (App. 26a). In *Bazemore* black workers hired prior to 1972 continued to be paid less then white contemporaries because salary levels two decades later were still based in part on pre-1972 salaries. 478 U.S. at 394. In the instant case, a white firm designated as a dealer prior to the pre-1979 freeze is paid $54.00 if it cuts and delivers a cord of pine pulpwood; a black owned firm, unable because of race to obtain that designation prior to 1979, receives only $47.50 to $52.00 for logging and delivering the identical cord of wood.

Bazemore held that Title VII was violated by

> salary disparities created prior to 1972 and *perpetuated* thereafter. . . . That the Extension Service discriminated with respect to salaries prior to the time it was covered by Title VII does not excuse *perpetuating* that discrimination . . . . [T]o the extent that the discrimination was *perpetuated* after 1972, liability may be imposed.

478 U.S. at 395 (emphasis added). In this case, however, the court below insisted that the *Bazemore* anti-perpetuation rule was inapplicable to claims of intentional discrimination. "*Bazemore* . . . addressed the use of prior act evidence to prove disparate impact under Title VII. Intent was not an

issue" (App 30a). Thus, the district court reasoned, *Bazemore* was irrelevant to a claim of intentional discrimination under 42 U.S.C.§§ 1981 and 1982 (App. 30a).

This decision is flatly inconsistent with this Court's actual opinion in *Bazemore* itself. Although Title VII applies both to intentional discrimination and to certain instances of disparate impact, the salary claim in *Bazemore* was an *intent* claim. Had *Bazemore* involved a disparate impact claim, a judicial determination of the legality of existing wage disparities would have required consideration, inter alia, of whether locking in pre-Act disparities might have been justified by "business necessity". But the Court's opinion in *Bazemore* refers neither to the essential disparate impact standards nor to any of the Court's numerous disparate impact decisions. *E.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Rather, this Court held simply that "the present salary structure . . . is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure", 478 U.S. at 397 n.6, a holding that made sense only if the Court regarded such perpetuation as a species of intentional discrimination. Subsequent decisions of this Court have recognized that the perpetuation in *Bazemore* violated Title VII because it amounted to a continuation of intentional pre-1972 discrimination. Thus in *Florida v. Long*, 487 U.S. 223, 239 (1988), the Court explained that "*Bazemore* concerned the continuing payment of discriminatory wages based on employer practices prior to Title VII."

The lower court's decision limiting *Bazemore* to Title VII effect claims conflicts as well with decisions in three other circuits and with decisions by two state supreme courts. These other jurisdictions uniformly agree that the circumstances in *Bazemore* were unlawful because they constituted a continuance of the original pre-1972 intentional discrimination. This contrary rule prevails in the

Fourth,[28] Sixth,[29] and Seventh Circuits,[30] as well as in the states of Minnesota[31] and West Virginia[32]. Far from limiting *Bazemore* to Title VII disparate impact claims, as did the courts below, these other jurisdictions treat *Bazemore* as equally applicable to claims under section 1981,[33] the Equal Pay Act,[34] the Age Discrimination in Employment Act,[35] ERISA,[36] the Pregnancy Discrimination Act[37] and

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[28] *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.2d 336, 347 (4th Cir. 1994) (*Bazemore* a "'continuing' violation"); *Nealon v. Stone*, 958 F.2d 584, 592 (4th Cir. 1992) (continuing violation principle applies under *Bazemore*).

[29] *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991) (*Bazemore* example of "continuing violation"); *EEOC v Penton Industrial Publishing Co., Inc.*, 851 F.2d 835, 838 (6th Cir. 1988) ("The Supreme Court has recognized the existence of a 'continuing violation' so long as disparities continue").

[30] *Webb v. Indiana National Bank*, 931 F.2d 434, 437 (7th Cir. 1991) (*Bazemore* a "continuing violation" so long as "[t]he disparity in pay persisted").

[31] *Sigurdson v. Isanti County*, 448 N.W.2d 62, 67-68 (Minn. 1989) (*Bazemore* recognizes "the continuing violation doctrine").

[32] *West Virginia Institute of Technology v. West Virginia Human Rights Commission*, 383 S.E.2d 490, 499 (W. Va. 1989) (*Bazemore* a "disparate treatment" claim involving a "continuing violation").

[33] *Webb v. Indiana National Bank*, 931 F.2d at 437.

[34] *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d at 345-50; *Nealon v. Stone*, 958 F.2d at 590 n.4; *EEOC v. Penton Industrial Publishing Company, Inc.*, 851 F.2d at 838.

[35] *Harrington v. Aetna-Bearing Co.*, 921 F.2d 717, 721 (7th Cir. 1991).

a variety of state anti-discrimination laws.[38] None of these decisions concerned, or suggested these other statutes even encompassed, disparate impact claims.[39]

(2) The decision below is inconsistent as well with half a century of decisions of this Court interpreting the Fourteenth and Fifteenth Amendments, which like sections 1981 and 1982 prohibit intentional racial discrimination. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

This Court has repeatedly struck down facially neutral state practices where they perpetuated prior discrimination. Thus the Court has held that states cannot continue to use voter registration lists constructed in a discriminatory manner even if subsequent registration is to be conducted in a non-discriminatory manner, *Louisiana v. United States*, 380 U.S. 145, 154-56 (1965). In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 21 (1974), the Court forbade former *de jure* segregated school systems from utilizing facially neutral practices which "perpetuate . . . the dual system." *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring) (Fourteenth Amendment requires modification of student assignment practices which "perpetuate a 'dual system'"); *Columbus Board of Educ. v. Penick*, 443 U.S. 449, 460 (1979) (school officials must assure that even facially neutral practices "do

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[36] *Pallas v. Pacific Bell*, 940 F.2d 1324, 1327 (9th Cir. 1991).

[37] *Pallas v. Pacific Bell*, 940 F.2d at 1326-27.

[38] *Id.* (California Fair Employment and Housing Act); *Sigurdson v. Isanti County*, 448 N.W. 2d 62, 67, 68 (Minn. 1989) (Minnesota Human Rights Act); *West Virginia Institute of Technology*, 383 S.E. 2d at 499 (West Virginia Human Rights Act).

[39] *See, e.g., Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d at 334-51 (applying *Bazemore* to a Title VII *intent* claim).

not serve to perpetuate . . . the dual school system"). In the context of higher education the Court has held that a state remains in violation of the Fourteenth Amendment if it "has perpetuated its formerly *de jure* segregation in any facet of its institutional system," *United States v. Fordice*, 505 U.S. ___, 112 S. Ct. 2727, 2735 (1992); *see also id.* at 2742 (facially neutral college mission designations adopted for non-discriminatory purpose nonetheless unconstitutional absent special justification if they "tend to perpetuate the segregated system"), 2743 (state has not met its constitutional obligations "when it perpetuates a separate but 'more equal'" segregated system).

The circumstances of this case bear an uncanny resemblance to the infamous "grandfather clause" found unconstitutional in *Guinn v. United States*, 238 U.S. 347 (1915). The statute in *Guinn* exempted from certain onerous voter registration requirements any person "who was, on January 1, 1866, . . . entitled to vote . . . [or any] lineal descendant of such person." 238 U.S. at 357. In the instant case, the exclusive right to do business with respondent, like the right to vote in *Guinn*, is increasingly exercised by the descendants of the original white beneficiaries of discrimination. Like the pre-1979 freeze in the instant case, the grandfather clause perpetuated indefinitely the favored treatment of whites that had occurred in the past. The grandfather clause, like respondent's policy freezing the pre-1979 dealer list, contained on its face no express racial distinction,

> but the standard itself inherently brings that result into existence since it is based purely upon a period of time [of avowed discrimination] and makes that period the controlling and dominant test of the right of suffrage.

238 U.S. at 364-65. The freeze at issue in the instant case establishes as "the controlling and dominant test" of

qualification for a current dealership whether a firm had been able to obtain a dealership prior to 1979, an era, petitioner alleges, when it was respondent's avowed policy to designate only whites as dealers.

(3) The decision below also departed from the teachings of this Court in holding that sections 1981 and 1982 permitted respondent to limit any new post-1979 dealers to firms already designated as dealers by other mills, where petitioner alleged that respondent well knew that those other mills had discriminated and continued to discriminate on the basis of race in selecting dealers.

In *Guinn*, for example, the Oklahoma grandfather clause conferred special status on persons who were "on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government." 238 U.S. at 384. The discriminatory status quo ante thus incorporated into Oklahoma law was primarily the discriminatory voter registration requirements imposed by jurisdictions *other than Oklahoma*. In 1866 most of what is now Oklahoma was Indian territory, and virtually all of the whites who in 1910 received favorable treatment under the Oklahoma law did so because they were descendants of white residents of other states. If it was intentional discrimination for Oklahoma thus to perpetuate discrimination by Texas and other southern states, surely the same is true where respondent bases its contracting practices on other mills' intentional discrimination, of which petitioner alleged that respondent was aware.[40]

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[40] In a decision handed down the same day as *Guinn*, the Court struck down an Annapolis ordinance which exempted from certain restrictive registration requirements "descendants of any person who prior to January 1, 1888, was entitled to vote in this State *or in any other State* of the United States." *Myers v. Anderson*, 238 U.S. 368, 377 (1915) (emphasis added). This standard effectively perpetuated pre-

(4) The evidentiary issues presented by this case are inextricably intertwined with the question presented regarding the scope of sections 1981 and 1982. In barring evidence of the historic exclusion of blacks from wood dealerships, the district court avowedly relied on its view that those sections simply did not forbid the knowing perpetuation of past intentional discrimination. The exclusion of that evidence thus rested on a mistaken interpretation of the substantive statutes at issue, not on any exercise of discretion.

Conclusion

The Court has dealt repeatedly and forcefully in the past with the problem of remedying discrimination against black citizens seeking to be hired and fairly treated by employers. It has had fewer opportunities to exercise its discretionary jurisdiction to grapple with the equally severe, widespread and persistent problems faced by black-owned firms or contractors and African-American entrepreneurs who seek to enter and to compete effectively in our nation's market economy. The Court has, rather, heard and decided principally reverse-discrimination claims by white-owned businesses. *See Adarand Constructors, Inc. v. Peña*, ___ U.S. ___, 115 S. Ct. 2097 (1995); *Associated General Contractors v. City of Jacksonville*, ___ U.S. ___, 113 S. Ct. 2297 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

The constitutional issues raised by these cases were of considerable moment. But surely the availability or non-applicability of federal statutory remedies to eradicate actual discrimination against black entrepreneurs is as important an issue for review as was ensuring, in those earlier cases, that

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1868 discrimination in all of the states from which Annapolis residents might have migrated by the early twentieth century.

voluntary remedial measures do not exceed permissible limits. For that reason, as well as for those given above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit in this matter.

Respectfully submitted,

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APPENDIX

March 28, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6205
Non-Argument Calendar

D.C. Docket No. VC-91-0851-CB-S

HERBERT LITTLES,

Plaintiff-Counter-Defendant-Appellant,

versus

CONTAINER CORPORATION OF AMERICA,

Defendant-Counter-Claimant-Appellees.

CLAUDE ALFORD,

Movant.

Appeal from the United States District Court
For the Southern District of Alabama

(March 28, 1995)

Before TJOFLAT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

Appellant is a producer of pulp wood. He sells the pulp wood he cuts to pulp wood dealers; the dealers, in turn, sell the wood to, among others, appellee's paper mill in

Brewton, Alabama.

In the district court, appellant contended that appellee had discriminated against him on account of his race, in violation of 42 U.S.C. §§ 1981 and 1982, by refusing to enter into a dealership contract with appellant. Appellant sought money damages and injunctive relief (requiring appellee to make him on of appellee's dealers). A jury found that appellee had not discriminated against appellant as alleged; accordingly, the district court gave appellee judgment on appellant's damages claim. Relying on the jury's finding of no discrimination, the court also denied appellant the injunction he sought.

Following the entry of final judgment for appellees, appellant moved the district court (1) for judgment as a matter of law, (2) to amend the court's findings of fact, (3) to alter or amend the judgment, and, alternatively, (4) for a new trial. The court denied appellant's motions.

Appealing, appellant contends:

First, that the district court erred in refusing to grant appellant judgment as a matter of law "on his claim that [appellee] refused to give him a wood dealer contract because of his race,"

Second, that the district court should have granted him a new trial "because the district court abused its discretion by excluding crucial evidence of [appellee's] racial motives, and

Third, that the district court abuse[d] its discretion by refusing to certify this desegregation case as a Rule 23(b)(2) class action."

None of appellant's contentions has merit. Given the evidentiary record in this case, appellant's first contention is frivolous. As for his second and third contentions, appellant fails to demonstrate an abuse of discretion.

The judgment of the district court is, accordingly,

AFFIRMED.

April 30th, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT LITTLES,
Plaintiff,

CIVIL ACTION NO.
91-0851-B-S

v.

CONTAINER CORPORATION OF
AMERICA,
Defendant.

ORDER

This matter came before the Court on March 4, 1992 for a hearing to determine plaintiff's right to bring his action as a class action pursuant to Rule 23(a), (b)(1), and (b)(2) of the Federal Rules of Civil Procedure on behalf of "all black persons residing in the Brewton, Alabama area who may now or in the future wish to enter into wood supplier or wood dealer contracts with defendant, or who may wish to be employed by such suppliers ..." (See Plaintiff's Amended Complaint).

Findings of Fact

Herbert Littles, by his testimony, is a logging contractor with some 30 years experience who basically "cuts and hauls" longwood timber. He has asked Container Corporation of America (herein CCA) for a dealership sc he can make more money, and be more in control by knowing what his workload would be and having the assurance that by converting his equipment to shortwood capacity to meet CCA's needs, he would be able to absorb the cost. He has

been a logging contractor, producing wood for the last six to eight years for Tri-State Timber Company which is a CCA dealer. Tri-State is owned by Claude Alford, whose deposition testimony largely reveals the source of Littles' complaint. Alford himself was a logger before he bought it. It appears he may well have been less experienced and stable in the logging industry than Littles was, (Alford's deposition, pages 24-30) at the time Littles applied for a dealership with CCA. This issue will be left to be developed at the trial of Littles' underlying complaint which challenges CCA's refusal to enter into a dealership agreement with Littles "on account of his race and color and pursuant to its purposefully discriminatory policy . . . of excluding black persons . . ." (Plaintiff's Complaint, para. 23).

Without, however, addressing the merits of plaintiff's personal cause of action, the issue before the Court on plaintiff's request to represent a class of similarly situated blacks rises and falls, (and in this case falls), on one of the prongs of the four part test of Rule 23(a), specifically 23(a)(1): "The class is so numerous that joinder of all members is impracticable." The analysis of this aspect obviates the need to address any of the other prerequisites of 23(a) or of (b)(1) and (b)(2).

Littles was able to "identify" only four to fix other black logging contractors in the Brewton area who hauled wood, presumably for other dealers, to CCA's Brewton mill. There used to be a lot more in the past, he testified, but not now as this has constantly changed over the years. When asked by his own counsel whether the number of black logging contractor in the area who would "constitute the class" would be more or less than 50 he answered "yes." Needing clarification, he was asked "more or less?" His answer (and here the Court is quoting from its bench notes, which if they are not one hundred percent accurate, clearly reflect the substance of Littles' answer): "I don't know the interest of the people. I have that gut feeling that if I am given this chance, the number could exceed more than 50, but I can't give you a number." His cross-examination

testimony was more specific, that he didn't know of one black logging contractor that had gone to CCA to ask for dealership, nor did he know if any of those were qualified to be CCA dealers.

Littles did produce several witnesses, including Tommy Odom, a black logging contractor (apparently one of the four to six) who testified he would like to be a dealer with CCA. Thomas Watson, another black logger testified he had never asked for a dealership because, as he put it, "it just came to my mind" that if he applied, the dealer he worked for, (not CCA) might terminate him.

Finally, CCA's procurement manager, Don Heath, testified that for reasons of economy CCA had reduced its number of authorized dealers from sixty-six in 1984 to thirty-eight as of 1991. During this period about fifty people had applied for new dealerships, and all but five were turned down. Of the fifty, two were black, Littles and Thomas Moore.

Conclusions of Law

Plaintiff's underlying claim is that CCA refused to enter into a dealership contract to purchase wood from him because he is black, in violation of 42 U.S.C. §§ 1981 and 1982. Plaintiff asserts that CCA's refusal to contract with or purchase directly from him is part of an intentional policy of discrimination which affects all blacks in the logging industry in the Brewton area. Hence, plaintiff seeks to maintain this action as a class action on behalf of himself and all other blacks who now, or in the future, wish to be wood dealers, wood suppliers or who wish to be employed by wood dealers or suppliers.

The class action was developed in equity and refined by the drafters of the Federal Rules of Civil Procedure to promote the efficient resolution of multiple claims or liabilities in a single action, to eliminate repetitious litigation and inconsistent adjudications involving common questions of law or fact, and to establish an effective procedure for those who might otherwise be economically unable to resort

to litigation. C. Wright, A, Miller and M. Kane, *Federal Practice and Procedure* § 1754 (1986). "[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

In light of these objectives, Rule 23 sets forth requirements that must be satisfied before an action may be maintained as a class action. The plaintiff bears the burden of persuading the Court that all of the prerequisites of Rule 23(a) and at least one of the prerequisites of Rule 23(b) are satisfied if a class is to be certified. *See Exell v. Mobile Hous. Bd.*, 709 F.2d 1376, 1380 (11th Cir. 1983). Rule 23(a) sets out the following prerequisites:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the black, (3) the claims or defenses of the representative parties will fairly and adequately protect the interests of the class.

Plaintiff purports to maintain this action under subdivisions (b)(1) and (b)(2). Because the plaintiff has clearly failed to satisfy the first requirement of subdivision (a), commonly referred to as numerosity, there is no need to address the remaining prerequisites.

In order to determine whether the number of potential plaintiffs is no numerous as to make joinder impracticable, the Court must first define the scope of the class. *Dudo v. Schaffer*, 82 F.R.D. 695, 699 (E.D. Pa. 1979). It is axiomatic that plaintiff cannot represent a group of which he is not a member. *See East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977) (holding that plaintiffs who were not qualified to be line-drivers could not represent class of persons who were denied line-driver positions); Wright, Miller & Kane, *supra.*, § 1761. If plaintiff is to be considered a member of a class, there must be some nexus between him and the group he seeks to represent. *Walker*

v. Jim Dandy, Co., 747 F.2d 1360, 1364 (11th Cir. 1984). In addition, plaintiff cannot represent a class of persons whose interests conflict with his own. *Scott v. University of Delaware*, 601 F.2d 76, 85-86 (3d Cir.), *cert. denied*. 444 U.S. 931 (1979).

Plaintiff purports to represent "all black persons residing in the Brewton, alabama, area who may now or in the future wish to enter into wood supplier or wood dealer contracts with defendant or who may wish to be employed by such suppliers or contractors." The class, as defined by plaintiff, can be divided into three subgroups: (1) those who may now or in the future wish to enter wood dealer contracts, (2) those who may now or in the future wish to enter wood supplier contracts, and (3) those who may now or in the future wish to be employed by wood dealers or suppliers.

Plaintiff is a member of and can represent only the first subgroup. Littles is now a wood supplier who would like to enter a wood dealership contract with the defendant. Not only is Littles not a member of the latter subgroups, he would appear to have a conflict with those groups. *Id.* He cannot represent those who wish to become wood suppliers because he already is one. Since only a limited amount of wood is needed by dealers who supply CCA, Littles would be competing with those who wish to become suppliers. Likewise, he cannot represent those who may wish to be employed by wood dealers or suppliers. He cannot represent those who wish to be employed by a dealer because he is already employed by a dealer. He cannot represent those who wish to be employed by a supplier because he is a supplier.

Moreover, plaintiff's cause of action based on defendant's alleged discriminatory refusal to contract is inapplicable to the latter subgroups. It is undisputed that CCA procures lumber only through dealers and does not contract with or purchase directly from any wood supplier. Nor does it contract with or purchase from anyone who is employed by a wood dealer or supplier. Thus CCA cannot

be said to have discriminated by refusing to contract in areas where it does not contract in the first place or by refusing to purchase from certain members of a group from which it does not purchase in the first place. The proper scope of the class, therefore, if all blacks in the Brewton, Alabama, area who may now or in the future wish to enter wood dealership contracts with CC^A. Plaintiff could identify only four to six logging contractors currently in the Brewton area but contends that he nevertheless has satisfied the numerosity requirement because the class includes future members who by their very definition make joinder impracticable.[1]

There is disagreement among courts as to the impact of future class members on the numerosity requirement in a (b)(2) class action where the plaintiff seeks injunctive relief which may have an impact on future class members. Some seem to suggest that the inclusion or future members *per se* satisfies the numerosity requirement. *Se.g., Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014 (5th Cir. Unit A Feb. 1981), *cert. denied*, 456 U.S. 960 (1982). Such an approach, however, is contrary to the Supreme Court's admonition in *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1'982), that a class action should be certified only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." At the other end of the spectrum, some courts refuse to consider future members of all. *See, e.g., Selzer v. Board of Educ.*. 1112 F.R.—. 176 (S.D.N.Y. 1986) (excluding future members from class definition).

The more reasoned approach, however, considers the existence of future members in light of all of the

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[1] The Court understood Littles' testimony that he had a "gut feeling" that the number of black logging contractors who would be interested in contracts with CCA if he were successful would be greater than fifty to be an estimate of future class member. This estimate is pure speculation and has no basis in fact.

surrounding circumstances. *See, e.g., Scott*, 601 F.2d at 88 ("[O]bjectives [of Rule 23] are undermined... by the facile conclusion that the numerosity requirement may always be satisfied in antidiscrimination class actions because there exist unidentified future class members who may suffer discrimination."). One commentator has identified several factors to be considered when the class is small:

> Apart from class size, factors relevant to the joinder impracticability issue include judicial economy arising from avoidance of a multiplicity of actions, geographic dispersement of class members, size of individual claims, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.

Newberg on Class Actions § 3.06 (1985).

In an action such as this there is no need for class treatment. There is no reason to believe that the number of persons who may be harmed in the future by defendant's allegedly discriminatory conduct is so great that judicial economy or the interests of the parties would favor resolution in a single action. *Cf. Rodriguez v Department of Treasury*, 108 F.R.D. 360, 363 (D.D.C. 1985) (Inappropriate to allow a purely speculative class to be the sole basis for the satisfaction of the numerosity requirement); *Durden v. R.H. Bouligny*, 22 Fair Empl. Prac. Cas. 1455 (N.D. Fla. 1979 (Plaintiff must prove that class of future members would be of sufficient size as to make joinder impracticable).

The potential class is limited by definition to a sparsely populated rural area. It is further limited to persons in the logging industry who wish to become wood dealers with CCA. CCA has drastically reduced the number of its wood dealers in recent years and has entered into only five new dealership contracts since 1984. Although he resources of potential litigants are likely to be small and the size of the claims are unknown at this point, future members

would have both incentive and resources to pursue their claims since both punitive damages and attorneys' fees are available under Section 1981 and 1982. *Claiborne v. Illinois Cent. R. R.*, 583 F.2d 143 (5th Cir. 1978) (punitive damages available under § 1981), *cert. denied*, 442 U.S. 934 (1979); *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977) (punitive damages available under § 1982); 42 U.S.C. § 1988 (Supp. 1986) (attorneys' fees available under both sections).

It is also important to consider the effect of this action on the rights of these future class members. *Scott*, 601 F.2d at 88. Future members would be bound by the outcome of this action, whether favorable or unfavorable to them. Since they are as yet unknown, future members, unlike class members now in existence, cannot opt out and have no way to protect their interests. The likely deterrent effect of a possible favorable outcome to the plaintiff in this cas lessens the need to certify the class. Furthermore, the injunctive relief requested by plaintiff, if given, could benefit all future plaintiffs.[2]

The Court's conclusion that future class members do not satisfy the numerosity/impracticability of joinder requirement in this case is not in conflict with he circuit precedents upon which plaintiff relies. In *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986), the Court held:

> [T]he district court did not abuse its discretion in finding that the numerosity requirement had been met. Plaintiffs have identified at least thirty-one individual class members, and the class incudes future and deterred job applicants, which of necessity cannot be identified. The certified class also includes applicants from a wide geographical area.

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[2] The scope of the injunctive relief depends, of course, upon the nature of the wrong. The Court cannot say at this point whether injunctive relief would have a direct effect on future class members.

In reaching the conclusion that the requirements of 23(a)(1) had been met, the appellate court noted that "[p]racticability of joinder depends on many factors, inclusion, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Id.*

Nor do *Phillips v. Joint Legislative Comm. on Performance Evaluation & Expenditure Review*, 637 F.2d 1014 (5th Cir. Unit A feb. 1981), and *Jack v. American Linen Supply Co*,, 498 F.2d 122 (5th Cir. 1974), compel the certification of a class based solely on the existence of future members. In *Phillips*, the court, relying on *Jack*, held that noted that [t]he alleged class contains future and deterred applicants, necessarily unidentifiable. In such a case the requirement of Rule 23(a)(1) is clearly met, for 'joinder of unknown individuals is certainly impracticable.'" *Phillips*, 637 F.2d at 1024 (quoting *Jack*, 498 F.2d at 124). However, in both *Phillips* and *Jack*, plaintiffs had identified thirty-three and fifty-one members, respectively, already in existence, numbers which would probably be sufficient, without the presence of future members, to meet the numerosity requirement. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986). Consequently, the presence of future members seems to have been only one factor in the numerosity/practicability of joinder consideration.

In sum, the Court finds that in this instance a class action is unnecessary. Plaintiff has failed to persuade the Court that the number of present or potential future members of the class are sufficiently numerous to satisfy the numerosity requirement of Rule 23(a)(1). It is, therefore, **ORDERED** that plaintiff's request for class certification be and hereby is **DENIED**.

DONE this the 30th day of April, 1992.

UNITED STATES DISTRICT JUDGE

March 3, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT LITTLES,
Plaintiff,

CIVIL ACTION NO.
91-0851-B-S

v.

CONTAINER CORPORATION OF AMERICA,
Defendant.

OPINION AND ORDER

This matter is before the Court on cross motions for summary judgment. Defendant Container Corporation of America seeks dismissal of the plaintiff's claim in its entirety. Plaintiff Herbert Littles seeks partial summary judgment on certain issues related to alleged past discrimination by the defendant. After careful consideration of the motions, the supporting briefs and evidence submitted by the parties and the relevant law, the Court finds that both motions are due to be denied.

FINDINGS OF FACT

Plaintiff Herbert Littles, who is black, is a wood producer or supplier who operates in the Brewton, Alabama area. Littles contends that defendant Container Corporation of America ("CCA") has discriminatorily denied him a wood dealership contract on account of his race in violation of 42 U.S.C. §§ 1981 and 1982. CCA operates a paper mill in Brewton that requires a continuous supply of various types of timber for its operation. CCA has developed contracts

with wood dealers to supply a certain amount of timber on a weekly basis. Those dealers, in turn, contract with wood suppliers, such as Littles, to deliver the wood to CCA.

For several years Littles has been interested in becoming a wood dealer, and has expressed his interest in CCA on several occasions. According to Littles, the last time he approached CCA about a wood dealership was in June of 1989 when he spoke with Don Heath, CCA's procurement manager. Although it is disputed whether or not CCA has directly rejected Littles' offer, it is CCA's position that Littles is not qualified to be a wood dealer. In October 1989, Littles filed the instant action alleging that CCA refused to contract with him because of his race.

CONCLUSIONS OF LAW

CCA contends that it is entitled to summary judgment for two reasons: (1) plaintiff's class is barred by the statute of limitations and (2) plaintiff cannot prove, by either direct or circumstantial evidence, that CCA intentionally discriminated against him. In response, plaintiff denies that his claim is barred by the statute of limitations and argues that he can prove discrimination not only by direct and circumstantial evidence, but also by proving that the defendant's current practices perpetuate past discrimination and by proving that the defendant's current selection criteria "lock in" past discriminatory practices. Moreover, plaintiff seeks partial summary judgment with respect to the last two issues because he contends that there can be no dispute that defendant has perpetuated past discrimination or that defendant's subjective hiring criteria lock in past discrimination.

Statute of Limitations

CCA contends that this action is due to be dismissed because plaintiff failed to file suit within the applicable limitations period. The statute of limitations governing suits

under § 1981 is the same as that governing suits under 42 U.S.C 1983. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 659 (1987). In Alabama that limitations period is two years. *See Owens v. Okure*, 435 U.S. 235 (1989((holding that where state has more than one personal injury statute of limitations, the residual personal injury statute applies to § 1983 actions); *Lufkin v. McCallum*, (11th Cir. 1992) (Alabama's two-year statute of limitations for personal injury actions governs § 1983 suite); *accord Jones v. Preuit & Mauldin*, 876, 1480 (11th Cir. 1989((en banc). Likewise, the same statute of limitations governs suits under § 1982. *Scheerer v.Rose State College*, 950 F.2d 661, 664-65 (10th Cir. 1991); *Allen v. Gifford*, 462 F.2d 615, 615 (4th Cir.), *cert. denied*, 409 U.S. 876 (1972); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 488 (7th Cir.), *cert. denied*, 400 U.S. 911 (1971).

For purposes of § 1981, the statute of limitations generally begins to run when the plaintiff knows or reasonably should know that the discriminatory act has occurred[.]" *Stafford v. Muscogee County Bd. of Education*, 688 F.2d 1383, 1390 (11th Cir. 1982). Defendant contends that Littles knew or should have known that CCA had refused to contract with him in June 1989, more than two years prior to the filing of this lawsuit, when Littles last discussed a dealership with Don Heath, defendant's procurement manager.

In support of its contention CCA cites deposition testimony in which Littles stated the following regarding his June 1989 meeting with Heath:

> Q What was [Heath's] response to your request [for dealership]?
>
> A I really don't remember. I don't remember.
>
> Q Was it your understanding that his response was negative?

A Yes, sir.

Littles dept. of Dec. 18, 1991 at 103. However, in a later deposition, Littles clarified what he meant by a "negative response.

> Q ... What else in the deposition were you referring to earlier this morning as wishing to change?
>
> A It's on page 103. I thought that it needed clearing up because according to my understanding, it's seemly [sic] that it's led to believe that when I talked with Mr. Heath about a dealership, that that was the closing of my approach for a dealership, but it was not.
>
> * * * * * * *
>
> A ... In another portion [of the first deposition] I was asked was it your understanding that his response was negative. Well, that's clear- negative, but it weren't a matter of closing the situation.
>
> I was, as I aforestated, I was under the impression that that definitely was the end of that conversation until we later communicated about this dealership.

Littles Dept. of April 30, 1992 at pp. 59-60.

Plaintiff contends that, at the least, the foregoing testimony illustrates a genuine issue of material fact as to whether Littles knew or should have known that his offer to contract had been rejected. In addition, plaintiff argues that his action is not barred because the alleged discrimination by CCA was a part of a continuing course of conduct. In *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), the Eleventh Circuit set forth the standard for determining whether a continuing violation has occurred:

> In determining whether [a] policy constitutes a

> continuing violation, therefore, we must distinguish between the 'present consequence of a one-time violation,' which does not extend the limitations period, and the 'continuation of the violation into the present,' which does.

Id. at 795 (quoting *Webb v. Indiana National Bank*, 931 F.2d at 438).

To illustrate the difference between a continuing violation and a one-time violation, the court in *Beavers* compared two Supreme Court cases, *Bazemore v. Friday*, 478 U.S. 385 91976) and *Delaware State College v. Ricks*, 449 U.S. 250 (1980):

> [In *Bazemore*] the black employees filed suit against the Extension Service, claiming, *inter alia* that the salary disparities [between black employees and white employees] violated Title VII. The Extension Service maintained that, because the disparities were solely the result of discrimination which occurred prior to Title VII's effective date, it should not be required to affirmatively eliminate them. The Supreme Court squarely rejected this argument, holding that the Extension Service's perpetuation of the salary disparities constituted a continuing violation of Title VII. "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII..."

Beavers, 975 F.2d at 796 (quoting *Bazemore*, 478 U.S. at 395-96).

The Supreme Court reached the opposite conclusion in *Ricks*. Ricks was a black professor who was denied tenure and given a one-year terminal contract. Ricks filed his EEOC claim within 180 days of signing his terminal contract, but not within 180 days of notification that he had been denied tenure. The plaintiff argued that the violation was a continuing one and, therefore, the limitations period should

not begin to run until the end of his final contract. In rejecting plaintiff's continuing violation theory, the Supreme Court held:

> It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure. In order for the limitations period to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which he employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure.

449 U.S. at 257-58.

Defendant argues that this case is like *Ricks* because Littles knew or should have known he was not going to receive a contract at the June 1989 meeting. However, the facts presented by plaintiff tend to prove that there was not a one-time action, such as the denial of tenure in *Ricks*. Indeed, according to plaintiff's evidence, CCA has never denied him a contract but has craftily dodges the statute of limitations issue by never saying yea or nay. Consequently, CCA can simultaneously argue (1) that the statute of limitations ran on the last occasion when Littles asked for but did not receive a dealership and (2) Littles has no cause of action because he has never been denied a dealership.

In *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), the Fifth Circuit addressed the issue of a continuing violation in a factual situation analogous to the case at hand. In *Abrams* plaintiffs were medical doctors who contended that the defendant, their employer, had discriminated against them because they were Jewish. Plaintiffs applied for a rotation in a program operated by the defendant in Saudi Arabia, but were turned down because, according to the defendant, they would not be able to secure visas to enter Saudi Arabia because they were Jewish. In truth, Baylor had never checked with the Saudis to

determine if this was true. Moreover, there was evidence at trial that Jewish members of the Baylor staff had entered Saudi Arabia to treat special patients.

Although plaintiffs did not file their Title VII action within 180 days after being denied a rotation in the Saudi program, the Court held that the suit was nonetheless timely under a continuing violation theory. The *Abrams* court recognized that a violation may not become apparent to a reasonable person based on a single act.

> Where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts, the violation may be found to be a continuing one that 'relieves a plaintiff who makes a such a claim from the burden of proving that the entire violation occurred within the actionable period.'

Id. at 532 (quoting *Berry v. Board of Supervisors*, 715 F.2d 971, 080 (5th Cir. 1983)). Consequently, the court had "no difficulty in upholding a finding of continuing violation when, as here, the employer's ambiguous acts serve to obscure the existence of an unlawful policy and fail to alert 'the average lay person to act to protect his rights.'" *Id.* at 533 (quoting *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1561 (5th Cir. 1985)).

Viewing the evidence in the light most favorable to the plaintiff, there is certainly a factual basis for plaintiff's contention that CCA engaged in a continuing violation. Plaintiff has offered evidence of a discriminatory policy which, as in *Abrams*, may only have become apparent after a period of time. First, there is evidence that CCA never denied plaintiff a dealership outright. The only evidence offered by defendant that it did deny plaintiff's request for a dealership was Littles' deposition testimony, quoted above, in which he stated that the result of the meeting with Heath was "negative". However, Littles points out that he simply meant that he did not get a dealership as the result of that meeting but left with the understanding that he was still

under consideration.

Second, the manner in which CCA awards its dealerships could easily serve to obscure any discriminatory policy.[1] Contract openings are not advertised and there is no formal application process. Instead, when CCA has a desire to add new dealers, it simply contracts the person or company with which it desires to do business. Littles made his desire to be a dealer known to CCA on several occasions in hopes that he would be chosen. According to Littles, each time he talked with CCA's procurement manager about a dealership, he was led to believe that he would be considered for a dealership in the future.

In *Abrams* the Fifth Circuit held that in order to establish a continuing violation, the plaintiff must prove more than the existence of a discriminatory policy. *Abrams*, 805 F.2d at 533. He must also prove that the discriminatory policy was applied to him within the statutory period. *Id.* In this case it is undisputed that the CCA has awarded five dealership contracts to white wood producers or dealers within the two years prior to the date plaintiff filed suit.

In sum, there is a genuine issue of material fact as to when, or if, plaintiff knew of should have known he was not going to receive a dealership contract from CCA. At best, defendant has presented evidence that might lead a reasonable jury to conclude that Littles should have known he had been rejected for a dealership in June of 1989. On the other hand, the evidence presented by plaintiff supports his position that defendant led him to believe that he remained under consideration for a dealership and, therefore, each tine the defendant awarded a dealership to another wood supplier or producer within the statutory

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[1] See the discussion of the *McDonnell Douglas* analysis and plaintiff's prima facie case, *supra*.

period constituted an actionable wrong.[2]

Proof of Discrimination

Plaintiff claims that defendant's decision not to award him a dealership contract violated both 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcement of contracts,[3] and 42 U.S.C. § 1982 which prohibits racial discrimination with respect to the exercise

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[2] The Court rejects plaintiff's alternative argument that a request for a dealership contract made in the context of a settlement offer made on his behalf by his attorney in a previous action against CCA constituted an offer and rejection within the statutory period. Although it is true that unless a rejection makes clear that a plaintiff will not receive further consideration that the limitations period may begin running anew with each time a plaintiff makes an application, *Webb v. Indiana National Bank*, 931 F.2d 434, 437 (7th Cir. 991), the problem with a plaintiff's argument is that the more recent offer and refusal was not the same offer and refusal that forms the basis of the instant complaint. Since the defendant's refusal to enter a settlement contract is not the subject of the instant action, the Court fails to see how defendant's refusal of that contract could serve as the basis for a suit for refusal to enter a dealership contract.

[3] 42 U.S.C. § 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, given evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

of property rights.[4] In order to prevail under § 1982 plaintiff must prove that the defendant intentionally discriminated against him. *General Building Contractors Assoc. v. Pennsylvania*, 458 U.S. 375 (1982).

Neither the Supreme Court nor the Eleventh Circuit has stated definitively whether proof of intentional discrimination is required under § 1982, *see Memphis v. Greene*, 451 U.S. 100, 119 (1981); *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1534 (11th Cir. 1986). However, other courts that have addressed the issue have found that proof of intent to discriminate is necessary. *Hamilton v. Svatik*, 779 F.2d 383, 387 (7th Cir. 1985); *Denny v. Hutchinson Salem Corp.*, 649 F.2d 816, 822 (10th Cir. 1981). In *Denny* the Tenth Circuit held that [b]ecause section 1982 is phrased in a manner similar to section 1981 and both statutes are of a common genesis, Congress must have intended each to incorporate the same standard." *Denny*, 649 F.2d at 822. *See also Runyon v. McCrary*, 427 U.S. 160, 190 (1976)(Stevens, j., concurring) ("it would be most incongruous to give § 1981 and § 1982] a fundamentally different construction"). Accordingly, this Court presumes that § 1982 also requires proof of discriminatory intent.

When proof of intentional discrimination is required, it is not sufficient to show that the defendant's practices had a discriminatory impact as is permitted in Title VII cases where intent is not an element. *See, e.g., Brown v.American Honda Motor Co. Inc.*, 939 F.2d 946 (11th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 935, 117 L.Ed.2d 106 (1992). Instead, plaintiff must offer either direct or circumstantial evidence of defendant's discriminatory intent. Although

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[4] 42 U.S.C. § 1982 states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

plaintiff has stated his intention to offer direct evidence of defendant's discriminatory intent, he has pointed out only circumstantial evidence of intent. The question is whether that evidence is sufficient to withstand defendant's motion for summary judgment.

The first and foremost difficulty in this case is that neither party can agree upon the model the Court should use to analyze the evidence. To assist trial courts in analyzing circumstantial evidence in employment discrimination cases under Title VII, the Supreme Court developed a model commonly referred to as the *McDonnell Douglas*, or shifting burdens, analysis. Recognizing that discriminatory intent is often a difficult thing to prove, the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, constructed the following method of proof:

> The complainant ... must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications ... The burden then must shift to the employer to articulate some legitimate nondiscriminatory reason for the employer's rejection.

McDonnell Douglas, 411 U.S. at 802-803. Once a defendant articulates a legitimate nondiscriminatory reason for its decision, the plaintiff bears the burden of proving that the defendant's "proffered reason was not the true reason" for its decision.

As both the Supreme Court and the Eleventh Circuit have recognized, the *McDonnell Douglas* analysis was never

intended to be rigid or mechanized test for proving intentional discrimination. *See Furnco Construction v. Waters*, 438 U.S. 567, 577 (1978); *McDonnell Douglas*, 411 U.S. at 802, n.13; *Harris v. Birmingham Board of Education*, 712 F.2d 1377, 1382 (11th Cir. 1983). As this case demonstrates, it simply does not work in every instance. Defendant contends that plaintiff cannot prove a prima facie case because defendant was not seeking dealers at the time plaintiff applied and because plaintiff was not qualified to be a dealer.

These elements, however, would be difficult, if not impossible, for any plaintiff to prove under the circumstances. As plaintiff points out, because this is not an employment discrimination case, there are not "openings" as there would be in a typical Title VII case. According to plaintiff, CCA metes out dealership contracts on an ad hoc basis by contacting wood dealers with whom it wishes to do business. Thus, plaintiff has an almost insurmountable burden in proving that an "opening" existed at any particular time.

Of course, having rejected the defendant's suggested method of analysis, the question still remains whether plaintiff has presented a prima facie case that CCA intentionally discriminated against him. Having reviewed the evidence in the light most favorable to the plaintiff, the court finds that Littles has come forth with sufficient evidence to establish a prima facie case of discrimination. the eleventh Circuit has held that subjective criteria applied by white decisionmakers may give rise to an inference of discrimination. *Harris v. Birmingham Board of Education*, 712 F.2d 1377, 1383 (11th Cir. 1983). In this case, plaintiff's criteria for awarding dealerships are arguably subjective. According to CCA, a prospective dealer must have access to an adequate supply of timber, a demonstrated ability to consistently produce and deliver wood in the desired form of species at the desired location, adequate working capital, vehicles and equipment, a good reputation for honesty and business skills, established reliability in the industry and

proven access to timber resources over a foreseeable period of time. None of these requirements is completely capable of measurement and the interpretation of each, therefore, is somewhat dependent upon the person or persons applying the criteria. In this case, the ultimate decisionmaker is CCA's procurement manager, Don Heath, who is white.

Other factors also contribute to plaintiff's prima facie case. An immediate past history of racial discrimination alone may support a prima facie case of intentional discrimination. *Id.* Plaintiff has presented evidence that CCA's Brewton mill has a history of racial discrimination in its employment practices. Finally, plaintiff has presented evidence that he was treated differently from a similarly situated white person. Plaintiff has presented evidence from which a jury could infer that he was at least as qualified as, if not more qualified than, Claude Alford, a white logger who was awarded a dealership contract by CCA.

Although CCA might otherwise prevail on summary judgment by proffering legitimate nondiscriminatory reasons for its decision, the Court finds that the evidence presented by plaintiff raises a question of fact as to whether those proffered reasons are pretextual. CCA contends that it refused to contract with Littles not because of his race but because he was not qualified to be a dealer. As noted above, Littles has presented evidence from which a jury could reasonably find that he was as qualified as at least one other CCA dealer.

While the Court finds that thee is a genuine issue of material fact with respect to plaintiff's circumstantial evidence of discrimination, the Court rejects plaintiff's additional proposed methods of proving discrimination set forth in his motion for partial summary judgment. In addition, to using the disparate treatment evidence outlined above in proving defendant's discriminatory intent, plaintiff also proposes two theories to prove, intent by showing: (1) that CCA's current practices perpetuate past and present intentional segregation of CCA's business environment and (2) that CCA's criteria for awarding dealerships "lock in" the

effects of CCA's historical discrimination.

Plaintiff contends that the Court should grant partial summary judgment because there is no dispute of material fact as to these issues; however, plaintiff concedes that he must prove at trial that he has been injured by these practices. Defendant disputes not only the factual basis for these claims, but also their relevance in this case.

The Court need not even determine whether there are any material disputed factual issues with respect to plaintiff's motion for partial summary judgment since the legal claims raised are not relevant in the instant action. As discussed above, if he is to prevail int his case plaintiff must prove that the defendant intentionally discriminated against him. Plaintiff cannot prove intentional discrimination by either theory of proof proposed in his motion for partial summary judgment. If these theories tend to prove anything, they prove discriminatory impact, which is not actionable under either § 1981 or § 1982.

Plaintiff's first argument, in a nutshell, is that because CCA was guilty of segregation in the part, it has an affirmative actionable under §§ 1981 and 1982. Or as plaintiff states, "until container does business with at least one black wood dealer, its historical segregation is actually present, unlawful segregation." Plaintiff cites a number of cases in support of the many loosely stated propositions that make up its argument. These cases, however, are cited out of context and none can be found to stand for the ultimate proposition plaintiff advances, *i.e.*, that failure to desegregate absent some prior court order requiring desegregation can give rise to a cause of action for intentional discrimination.

For example, plaintiff cites *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977), for the proposition that desegregation principles apply to private discrimination. However, in that case there was no question that the school currently intentionally maintained a discriminatory admissions policy. Plaintiff's theory in the instant case is somewhat akin to revisiting the Dade Christian Schools twenty years later and finding them guilty of intentional

discrimination because there is not a black student in every classroom. Plaintiff also cites public school desegregation cases and voting rights cases decided under the fourteenth Amendment which have little relevance in the context of this case. *E.g.*, *Hunter v. Underwood*, 471 U.S. 222 (1985); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US. 1 (1971); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).

Plaintiff's second argument is that CCA's employment criteria systematically discriminate against blacks by locking in prior discrimination. In other words, certain requirements cannot be met by any black person in the Brewton area simply because blacks in that area historically have been kept out of positions of power and authority due, in part, to CCA's practice or relegating blacks to low-paying jobs. If this were a disparate impact case, plaintiff would have a compelling argument. However, in this case plaintiff must prove not just that the selection criteria had a disparate impact on blacks, but that CCA selected the criteria for that reason. *Brown v. American Honda Motor Co, Inc.*, 939 F.2d at 953. Since the Court has concluded that both § 1981 and § 1982 require proof of discriminatory intent, plaintiff's evidence of disparate impact has no relevance in this case.[5]

Conclusion

Plaintiff has presented sufficient circumstantial evidence to raise a genuine issue of material fact as to the whether CCA intentionally discriminated against him on the

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[5] However, as noted in the discussion of plaintiff's prima facie case, *infra*, evidence of historical discrimination is relevant to prove intent. In other words, although plaintiff may offer evidence at trial of CCA's immediate past history of discrimination as evidence of current discriminatory intent against plaintiff, he may not proceed on the theory that adoption of policies that unintentionally "lock in" past discrimination are sufficient to prove his cause of action under either § 1981 or § 1982.

basis of race. In addition, whether this suit is barred by the statute of limitations depends upon the resolution of disputed facts. For these reasons, the Court finds that CCA is not entitled to summary judgment. Because the issues raised by plaintiff in his motion for partial summary judgment are only relevant to show proof of intentional discrimination, and that will require the resolution of disputed facts, plaintiff's motion for summary judgment is also due to be denied.

Accordingly, it is **ORDERED** that the motion for .summary judgment filed by defendant Container Corporation of America is due to be and thereby is **DENIED** It is **FURTHER ORDERED** that the motion for partial summary judgment filed by plaintiff Herbert Littles likewise is due to be and hereby is **DENIED**.

DONE this the 3d day of March, 1993.

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UNITED STATES DISTRICT JUDGE

August 23, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT LITTLES,
Plaintiff,

CIVIL ACTION NO.
91-0851-B-S

v.

CONTAINER CORPORATION OF AMERICA,
Defendant.

ORDER

This matter is before the Court on a motion in limine filed by defendant Container Corporation of America ("CCA") objecting to, *inter alia*, the introduction at trial of historical evidence of discrimination and segregation. For reasons set forth more fully below, the Court finds the motion is due to be granted, in part.

Plaintiff intends to introduce both historical evidence of past discrimination by CCA and historical evidence of segregation in the Southern timber industry and in Southern society as proof that CCA intended to discriminate in this instance.[1] CCA contends that such evidence is irrelevant and, even if relevant, is unfairly prejudicial, a waste of time and misleading. Plaintiff argues that the evidence is admissible to prove defendant's discriminatory intent or motive in denying plaintiff a contract.

Before addressing the specific types of evidence

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[1] These issues are covered in the Revised Pretrial Order by Disputed Facts 7, 11 and 13.

plaintiff seeks to introduce, it is important to review the fundamental rules governing the admissibility of evidence, in general, and character evidence, in particular. Evidence is admissible only if relevant. **Fed. R. Evid.** 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." **Fed. R. Evid.** 401. It is an elemental rule of evidence that character evidence, including evidence of specific acts, is not admissible to prove that a person or corporation acted in conformity therewith on a particular occasion. **F.R.E.** 404(a); J. Strong, *McCormick on Evidence* § 188 (4th ed. 1992). However, other act evidence is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident." **Fed. R. Evid.** 404(b).

Several courts have recognized that evidence of other acts of discriminatory conduct by a defendant may be admissible to prove discriminatory intent. *See, e.g, Allen v. County of Montgomery*, 788 F.2d 1485, 1488 (11th Cir. 1986); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 349-350 (1st Cir. 1989); *Stair v. Lehigh Valley Carpenters Local 600*, 813 F. Supp. 1116, 1119 (E.D. Pa. 1993) (and cases cited therein). As the *Stair* court noted, however, "[t]here are ... limitations to the admissibility of such evidence. Incidents that are too remote in time or too dissimilar from a plaintiff's situation are not relevant." *Stair*, 813 F. Supp. at 1119. Moreover, evidence otherwise admissible may nonetheless be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." **Fed. R. Evid.** 403

Plaintiff's prior act evidence can be placed into three broad categories. First, plaintiff seeks to introduce evidence that CCA discriminated against blacks seeking management positions in CCA's Brewton mill during the 1980's. This alleged discrimination was the subject of a suit against CCA, *Harrison v. Container Corporation of America*, filed in the

United States District Court for the Middle District of Alabama, which was subsequently settled by consent decree. Second,plaintiff seeks to introduce evidence of discrimination against blacks in lower-level mill jobs during the 1960's and early 1970's, which was the subject of a suit filed against CCA in this district, *Suggs v. Container Corporation of America*. The parties entered a consent decree in *Suggs* in 1974. Finally, plaintiff seeks to introduce evidence of segregation in the timber industry to place the defendant's alleged continuing practice of segregation in context.

The first issue for the Court is whether, as plaintiff suggests, there is a general rule allowing the admission of historical evidence of discrimination to prove intent. After examining the cases cited by plaintiff, the Court has determined that there is such general rule and, therefor,e each type of evidence must be examined for relevance and the possibility of prejudice and confusion of the issues.

The plaintiff cites *Sims v. Montgomery County Commission*, 766 F. Supp. 1052 (M.D. Ala. 1990), in support of its contention that all evidence of CCA's past discrimination is relevant and admissible. The *Sims* court held that evidence of discrimination that occurred twenty years earlier was admissible because the evidence was "relevant to viable claims." *Id.* at 1085. The Court did not weigh the prejudice of considering such evidence, although presumably the possibility of prejudice was lessened because the case was tried to a judge and not to a jury.

In considering such evidence relevant to prove intent, the *Sims* court cited two United States supreme Court cases, *Bazemore v. Friday*, 478 U.S. 385 (1986) and *United Airlines v. Evans*, 431 U.S. 553 (1977), neither of which stand for the proposition plaintiff would have the Court adopt, *i.e.*, that historical evidence is *per se* relevant to prove intent to discriminate. Both of those cases addressed the use of prior act evidence to prove disparate impact under Title VII. Intent was not an issue.

In *Evans* the plaintiff argued that the seniority system

she challenged gave "present effect to past discrimination." The Court held that evidence of discrimination that was not made the basis of a timely EEOC charge could be considered as "relevant background evidence in a proceeding in which the status of a current practice is at issue." For example, if a plaintiff in a disparate impact case challenges facially neutral employment practices that lock in prior discriminatory practices, historical evidence of those prior practices is obviously relevant. *Walker v. Jefferson County Home*, 726 F.2d 1554, 1557 (11th Cir. 1984).

Similarly in *Bazemore* the question was whether the district court should have considered evidence of salary disparities which occurred before the effective date of Title VII which continued past the effective data. In holding such evidence was admissible, the Supreme Court stated:

> As we made clear in *Hazelwood School District v. United States*, 433 U.S. at 309-310, n.15, 53 L.Ed.2d 768, 97 S.Ct. 2736 '[p]roof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued particularly where relevant aspects of the decisionmaking process had undergone little change.'

Bazemore, 478 at 402. In the context of *Bazemore* it is clear that the evidence of pre-Act discrimination was relevant to show that it continued, not to show that the continuation of that discrimination was intentional.

Having determined that there is no *per se* rule of admissibility of evidence of historical evidence of discrimination, the Court must now examine each category of evidence plaintiff seeks to introduce for relevance as well as the possibility of prejudice and confusion. The first category of evidence is testimony by plaintiffs in the *Harrison* case regarding CCA's alleged discrimination against blacks who sought management positions. the Court finds this evidence probative of intent in this case since it appears to

be contemporaneous with the alleged discrimination in this case. Moreover, both cases involve defendant's alleged refusal to place blacks in positions of authority. Although defendant contends that it will be prejudiced by having to litigate the issue of discrimination as to each of these witnesses, the Court finds that they are highly probative of intent, especially, as plaintiff points out, in light of the limitations of *St. Mary's Honor Center v. Hicks*, 61 U.S.L.W. 4782, 1993 WL 220265 (June 25, 1993). The possibility of prejudice and confusion caused by this type of evidence can be minimized by limiting the number of witnesses who will testify as to this issue and by giving an appropriate instruction to the jury as to the purpose of which it may consider such evidence.

Plaintiff's second category of prior act evidence, alleged discrimination in the mill against the *Suggs* plaintiffs during the early 1970's, is too remote to be use to prove that CCA intentionally discriminated against Littles fifteen to twenty years later. Although one can infer present intent to discriminate from prior acts of discrimination, at some point the probative value of those prior acts diminishes to a point that their relevance, if any, is outweighed by the likelihood of prejudice. To require the defendant to defend against employment decisions made more than twenty years ago would be extremely prejudicial, especially in light of the diminishing probative value of acts made by other decisionmakers during a different ear. *Cf.*, *Stair*, 813 F. Supp. at 1120 (holding evidence of prior acts of discrimination occurring six to eight years earlier too remote).

Finally, plaintiff's evidence of discrimination in the timber industry is not relevant in this case. Such evidence goes a step beyond **Fed. R. Evid.** 404(b) which does not allow evidence of the evidence of prior acts of others to prove the defendant's intent. Plaintiff's case law does not support his assertion that the historical segregation of the timber industry and of Alabama society, in general, is relevant to prove defendant's intent. In the case cited by

plaintiff, *Ammons v. Dade City*, 594 F. Supp. 1274 (M.D. Fla. 1984), a group of blacks challenged the city's discriminatory refusal to grant city services to blacks. the court held that it was proper to consider the city's past history of inadequately funding those services for black communities as evidence of intentional discrimination. The evidence considered by the *Ammons* court was, in essence, evidence of prior acts by the defendant which the court concluded was probative of the defendant's intent.

In sum, the Court holds that plaintiff may introduce evidence of prior acts of discrimination which were the subject of the Harrison case. Prior act evidence from the *Suggs* case is excluded on the grounds that it is too remote and too prejudicial. Finally, evidence of segregation of the timber industry is not relevant to the issues in this case and will, therefore, be excluded.

Accordingly, it is **ORDERED** that the motion in limine be **GRANTED**, in part. Plaintiff will not be allowed to introduce evidence of prior acts of alleged discrimination against the *Suggs* plaintiffs, nor will plaintiff be allowed to introduce evidence of historical segregation in the timber industry or in Alabama society.

DONE this the 23d day of August, 1993.

S/S
UNITED STATES DISTRICT JUDGE

Filed August 23, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT LITTLES,
Plaintiff,

CIVIL ACTION NO.
91-0851-B-S

v.

CONTAINER CORPORATION
OF AMERICA,
Defendant.

ORDER

Before the Court is defendant's revised motion in limine which seeks to excluded several types of evidence referred to in the revised pretrial order. The Court has entered a separate order addressing the admissibility of historical evidence of discrimination, the first type of evidence challenged by defendant. As to the other issues raised in the motion in limine, the Court enters the following orders:

1. Equal Opportunity Evidence

Defendant objects to introduction of evidence concerning whether blacks have an equal opportunity with whites to satisfy Container's selection criteria for wood dealers. For the reasons discussed in the Court's order on summary judgment, this is "disparate impact" evidence which is not admissible in this case. Accordingly, the motion in limine is **GRANTED** as to such evidence.

2. The Racial Characteristics of the Defendant's Employees

Defendant objects to introduction of evidence as to whether there have ever been black employees in managerial positions which have a say in awarding dealership contracts. The Court finds that such evidence is relevant. Accordingly, the motion in limine is **DENIED**

3. Container's Business Transactions with Other Dealers

Defendant objects to any evidence regarding its practice of financing interest-free timber loans to wood dealers or regarding its practice of financing equipment sales to existing dealers. According to defendant, this evidence is irrelevant because plaintiff is not a wood dealer. The Court finds, however, that the evidence is relevant to impeach defendant's proffered reasons for denying a dealership contract to plaintiff. Therefore, the motion in limine is **DENIED** as to this evidence.

4. Comparative Evidence Regarding Plaintiff and CCA Wood Dealers

Defendant objects to the introduction of the plaintiff's gross receipts for the period 1987 to 1992 and the gross receipts from Claude Alford, a CCA wood dealer, for the period 1982 to 1986, for the purposes of making a comparison between the two. Defendant's objection is twofold. First, CCA argues that the comparison is one of "apples and oranges" because of the two different time periods. Plaintiff's purpose in submitting evidence from two different time periods is to compare plaintiffs' gross receipts for the give-year period leading up to his most recent application for a contract with Alford's gross receipts for the five years before he was awarded a dealership. For this purpose, the Court finds a comparison is relevant. The Court disagrees with CCA's second argument that gross receipts tend to prove nothing. As plaintiffs points out, they are indicative of volume. The amount of weight to give this

evidence is for the jury to decide. Therefore, the motion in limine is **DENIED**

5. CCA's Reasons for Not Contracting with Littles

CCA objects to evidence as to whether it would, in fact, experience adverse effects if it gave Littles a wood dealership to produce directly the wood he is currently producing through a dealer. According to CCA, the only relevant evidence is whether it **reasonably believed** it would suffer adverse effects. Whether it would, in fact, suffer adverse consequences certainly has a bearing on whether CCA could reasonably believe it would suffer adverse consequences. Accordingly, the motion in limine in **DENIED** AS TO THIS EVIDENCE.

6. Additional Objections to Exhibits

Any rulings necessary on these exhibits are hereby reserved for trial.

DONE this the 23d day of August, 1993.

S/S
UNITED STATES DISTRICT JUDGE

Transcript of Trial, August 24th, 1993

[279] THE COURT: All right, sir. Go ahead. The jury is out.

MR. BLACKSHER: Mr. McRight, in his cross-examination of Mr. Littles, suggested by his question and elicited information that there has been no black dealers since 1980 in the Brewton area in south Alabama and Florida, nor has there been any black companies or persons that might have the minimum qualifications to be dealers since 1980.

And he has read an extensive allegation from the complaint of the Plaintiff that there are no blacks in the Brewton area with financial resources, the equipment or other sources of requirement, and I don't remember the exact language of the allegation, to allow blacks to get started in this business. And he has done it in a way that suggests that that explains why Container Corporation has not entered into a contract with the black dealers, because none is available.

Well, the reason none is available, as my [280] complaint alleges, when you read the parts before and after what Mr. McRight said, is because segregation put black people in Brewton and in the south in that position.

If we are not allowed to demonstrate to the jury what the reason for this defense is, it is the same as Container saying that blacks dropped drown into this situation out of Mars or more to the point, it's an argument that we always suspected blacks really are inferior, really are incompetent as a people, they are not up to conducting business with us. That is the impression that he hopes to leave with this jury, either consciously or subconsciously.

In any event, not only does it get into the proof that we offered to show, that Container is very

conscious of the necessary consequences of its present policies but it actually turns that around and uses the necessary consequences as a defense for why it has not hired black dealers without us having the opportunity to show that that reason is racially discriminatory and they know it. And intentionally racially discriminatory.

MR. MCRIGHT: Mr. Kirkland, I think, went to some lengths to explain that there are no black dealers at Container.

* * * * * *

[802] August 26th, 1993.
Nine o'clock a.m.

(In Chambers)

THE COURT: All right. Let's go on the record for the Court's ruling on the matter that Mr. Blacksher brought up during the testimony of Mr. Harper yesterday regarding his desire to cross-examine Mr. Harper regarding the Harrison litigation as it related to Mr. Harper's testimony regarding the exhibit, Defendant's Exhibit 64 and the promotions to managerial position within the mill.

The Court's order dealing with that issue, which was entered on the -- actually I don't think I signed it until the day this case started on August 23rd, but counsel has been made aware of it the Thursday before that. That order clearly allowed evidence of apparent race discrimination of promotions to managerial positions within the mill as being closely analogous to the wood yard situation regarding the lack of any black dealers there.

It did so, however, without reference to there having been the Harrison suit to resolve those issues

because that was a consent decree without any admission of liability by Container. So the Court's judgment is that the decree was therefore irrelevant.

[803] To leave the Plaintiff with the uncontroverted evidence of Jimmy Watson and Theodore Dean regarding discrimination of managerial positions within the mill would be unfairly prejudicial to Container if the only way Container could offer evidence in contradiction of that was that Container made certain black managerial promotions during and after the Harrison suit was filed and settled.

So the Court will allow the Exhibit 64 in evidence and Mr. Harper's testimony regarding it without reference to the Harrison suit, just as it did with the Plaintiff's offer of Watson's and Dean's testimony. So that what the jury has before it is evidence of container's possible discrimination in mill management positions at the time Littles was negotiating with Don Heath in '88 or '89 followed by Container's post '88 and '89 promotion of Harrison on May 21st of '90 and Dean on January 6th of '92 to managerial positions.

At best, even if the Harrison decree were relevant under Rule 403, the Court finds that it would unduly confuse the issue to allow it to be admitted at this time.

Okay. Are we ready to go? Do you want to add something to that, Jim?

MR. BLACKSHER: We at this time and probably [804] perhaps even later, depending on what additional evidence the defendant presents, will want to ask the Court to reconsider its earlier rulings disallowing us from calling our historian and seeking mill witnesses about earlier segregation on the theory, that I will not repeat at this time but was discussed yesterday, that witnesses proffered by the defendant have opened the door to that evidence.

THE COURT: All right, sir.

MR. BLACKSHER: And the reason I am saying that now is because if you decide to let me do that I have to have some notice to get them here.

THE COURT: I have not seen the door opened that far yet without repeating the reasons that I have stated earlier. Do you want the Norrell affidavit to become a part of the trial record as a proffer?

MR. BLACKSHER: Yes, Your Honor, as a proffer.

THE COURT: William, even though it's in the file, let's simplify it. It is the document filed on August the 23rd in open Court, the plaintiff's offer of prove. Let's make it a Court's exhibit.

THE CLERK: It will be Court's Exhibit 1.

THE COURT: Which is the affidavit of Robert J. Norrell.

THE CLERK: Is that just the affidavit or the [805] entire proffer?

THE COURT: Do you want just the affidavit as the exhibit?

MR. BLACKSHER: I want the whole thing. It's not going to be shown to the jury so I want the whole thing in there.

THE COURT: Are we complicating the record? Because the pleading is part of the record.

THE CLERK: Yes, sir, it will be documented.

THE COURT: It is incorporated for the purposes of this hearing so that the Appellate Court in reviewing the trial record will understand that this document that we are now referring to is the proffer by Mr. Blacksher at this time of what he would expect the evidence to be if I were to allow him to testify.

* * * * * *

August 27, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

HERBERT LITTLES,
Plaintiff,

CIVIL ACTION NO.
91-0851-B-S

v.

CONTAINER CORPORATION
OF AMERICA,
Defendant.

The above styled case came on for trail by jury on August 23, 24, 25, 26 & 27, 1993 with the Honorable Charles R. Butler, Jr., United States District Judge, presiding. The jury was selected, but not sworn, on August 3, 1993. The jury was sworn and trial begun on August 23, 1993.

Now on this 27th day of August, 1993 comes the jury who having heard the evidence, the arguments of counsel, the charge of the Court and having considered the same upon their oaths return the following verdict into open court, to-wit:

"1. Do you find by a preponderance of the evidence that the plaintiff Herbert Littles knew or should have known on or before October 17, 1989, that Container had denied him a wood dealership?

YES___
NO_X_

If "yes", sign and return the verdict form.

2. Do you find by a preponderance of the evidence that the defendant Container Corporation of

America intentionally discriminated against the plaintiff, Herbert Littles on the basis of race in refusing to award him a wood dealership contract?":

YES___
NO__X__

IF "No", sign and return the verdict form.

3. If "Yes," to question 2, what amounts do you award to plaintiff:

(1) As compensatory damages?__ $____

(2) As punitive damages? (Permitted only if you find that Container acted with malice, willfulness or reckless indifference to plaintiff's federally protected rights)

$_____

Joel Altherr
FOREPERSON."

The Court will by separate document enter judgment in accordance with the verdict of the jury.

S/S
UNITED STATES DISTRICT JUDGE

December 1, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT LITTLES,
Plaintiff,

CIVIL ACTION NO.
91-0851-B-S

v.

CONTAINER CORPORATION OF AMERICA,
Defendant.

ORDER

The first matter before the Court is "Plaintiff's Post-Verdict Motion for Judicial Findings of Fact and Equitable Relief". (Doc. # 107) In considering plaintiff's claim for equitable relief, the Court is bound by the jury's determination of factual issues. *Lincoln v. Board of Regents*, 697 F.2d 928, 935 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983). Plaintiff contends that the Court should grant the equitable relief prayed for in the complaint even though the jury found against plaintiff as to his legal claims. According to plaintiff, the issues upon which he bases his equitable claims were not addressed by the jury. Rather than summarize the entire course of this litigation, suffice it to say that the legal arguments raised by plaintiff in support of these claims have been previously rejected by this Court. Accordingly, plaintiff's motion for equitable relief is hereby **DENIED**. Judgment shall be entered by separate order.

Also before the Court is defendant's motion for **Fed. R. Civ. P.** 11 sanctions which is contained in defendant's response to plaintiff's motion for equitable relief. (Doc. # 108) Defendant argues that the Court should sanction

plaintiff for his "persistent pattern of misrepresenting facts, testimony and evidence" and for his "mischaracterization of legal precedent".

Whether to impose sanctions under Rule 11 is within the discretion of the trial court. *See Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (en banc). The Court does not find the imposition of sanctions to be warranted in this instance. Accordingly, defendant's motion for Rule 11 sanctions is hereby **DENIED**.

Finally, defendant alternatively contends that as the prevailing party it is entitled to attorney's fees pursuant to 42 U.S.C. § 1988. Attorney's fees may be awarded to a prevailing defendant under Section 1988 if the Court finds that the action was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. E.E.O.C.*, 434 u.s. 412, 421; *Hughes v. Rowe*, 449 u.s. 5, 14-15 (1980).

> In determining whether a suit is frivolous, 'a district court must focus on the question whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful.'

Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 1189 (11th Cir. 1985) (quoting *Jones v. Texas Tech University*, 656 F.2d 1137, 1145 (5th Cir. 1981)). The Court, having previously found that plaintiff had presented issues that could only be resolved by the trier of fact, cannot now say that the action was frivolous. Accordingly, the motion for attorney's fees pursuant to 42 U.S.C. § 1988 is **DENIED**.

DONE this the 1st day of December, 1993.

S/S
UNITED STATES DISTRICT JUDGE

December 1, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT LITTLES,
Plaintiff,

CIVIL ACTION NO.
91-0851-B-S

v.

CONTAINER CORPORATION OF
AMERICA,
Defendant.

FINAL JUDGMENT

Pursuant to the jury verdict of August 23, 1993, and pursuant to separate order entered this date addressing plaintiff's claims for equitable relief, it is hereby

ORDERED, ADJUDGED and **DECREED** that judgment be and hereby is entered in favor of the defendant, Container Corporation of America, and that the plaintiff recover nothing. Costs shall be taxed in accordance with 28 U.S.C. § 1920 and Local Rule 13.

DONE this the 1st day of December, 1993.

S/S
UNITED STATES DISTRICT JUDGE

February 10, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT LITTLES,
Plaintiff,

CIVIL ACTION NO.
91-0851-B-S

v.

CONTAINER CORPORATION OF
AMERICA,
Defendant.

ORDER

This matter is before the Court on plaintiff's motion for judgment as a matter of law (doc. #s 111 and 112), plaintiff's motion for amendment to the Court's findings (doc. # 111), and plaintiff's motion to alter or amend the judgment, or alternatively, for a new trial (doc. # 111). After review and consideration these motions, it is hereby **ORDERED** THAT EACH OF THESE MOTIONS BE AND HEREBY IS **denied.**

DONE this the 1st day of December, 1993.

S/S
UNITED STATES DISTRICT JUDGE

June 13, 1995

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HERBERT LITTLES,

Plaintiff-Counter-Defendant-Appellant,

Versus

CONTAINER CORPORATION OF AMERICA,

Defendant-Counter-Claimant-Appellee.

CLAUDE ALFORD,

Movant.

On Appeal from the United States District Court
For the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Bank are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/S

_____

UNITED STATES CIRCUIT JUDGE

(2)

Supreme Court, U.S.
FILED
OCT 26 1995
CLERK

No. 95-486

In The

Supreme Court of the United States

October Term, 1995

HERBERT LITTLES,

Petitioner,

v.

JEFFERSON SMURFIT CORPORATION (U.S.),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Eleventh Circuit correctly affirm the verdict of a racially diverse jury that Respondent Jefferson Smurfit Corporation (U.S.) did not intentionally discriminate against Petitioner Herbert Littles in violation of 42 U.S.C. §§ 1981 or 1982 when it declined to enter into a supplier contract with Littles?

PARTIES

The parties are:

Petitioner: Herbert Littles

Respondent: Jefferson Smurfit Corporation (U.S.) (hereinafter referred to as "JSC"), a Delaware corporation.[1]

---

[1] *Rule 29.1 Listing:* Subsequent to the commencement of this action, the named defendant, Container Corporation of America, was merged into JSC. JSC is a wholly-owned subsidiary of JSCE, Inc., a Delaware corporation and wholly-owned subsidiary of Jefferson Smurfit Corporation, a Delaware corporation that is publicly traded. JSC's subsidiaries, other than wholly-owned subsidiaries, are Smurfit Newsprint Corporation, a Delaware corporation; Groveton Paper Board, Inc., a New Hampshire corporation; and Dalton Paper Products, Inc., a Georgia corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

I. JSC USES A DEALERSHIP SYSTEM TO ACQUIRE PULPWOOD AND DOES NOT CONTRACT DIRECTLY WITH WOOD PRODUCERS LIKE LITTLES 2

A. How the Dealership System Operates ... 2

B. JSC's Business Reasons for Relying on the Dealership System 4

C. JSC Makes Supplier Contracts Only with Firms Already in Business as Dealers 5

D. JSC's Policy of Limiting Contracts to Suppliers Already in Business as Dealers Has an Equal Impact on Blacks and Whites .. 6

E. Littles Is Not a Wood Dealer 7

F. JSC's "Dealers Only" Policy Does Not Prevent Littles from Going into Business as a Dealer 8

II. JSC HAS NOT CONTRACTED WITH ANY BUSINESS THAT IS SIMILARLY SITUATED TO LITTLES' BUSINESS 9

SUMMARY OF ARGUMENT 12

ARGUMENT 14

TABLE OF CONTENTS – Continued

Page

I. THE DECISIONS BELOW WERE CONSISTENT WITH AND COMPELLED BY APPLICABLE LAW 14

A. Littles Failed Even to Establish a Prima Facie Case of Intentional Discrimination 15

B. JSC's Standards for the Selection of Its Wood Dealers Are Legitimate and Nondiscriminatory 16

C. JSC's Reasons For Not Contracting with Littles Are Not Pretexts For Discrimination 16

II. THE ELEVENTH CIRCUIT'S DECISION RAISES NO ISSUE THAT WARRANTS REVIEW BY THIS COURT 17

A. Littles Did Not Proffer Any Evidence of Historical Discrimination by JSC in the Making of Supplier Contracts 17

B. Littles' New Argument That JSC Relies on a "Grandfather Clause" Is Not Supported by the Evidence Presented or Proffered at Trial 19

C. The Settlement of Employment Discrimination Lawsuits Against Separate Corporate Divisions of JSC Are Irrelevant to Littles' Claim of Contractual Discrimination by JSC's Woodlands Division 20

D. The District Court's Rulings With Respect to Littles' "Evidence" of Discrimination in the Pulp and Paper Industry as a Whole Were Within the Court's Discretion 23

TABLE OF CONTENTS – Continued

Page

E. This Case Presents No Conflict with Decisions of this Court or of Other Circuits.. 24

F. The Fourteenth and Fifteenth Amendment Cases Cited by Littles Are Irrelevant to this Lawsuit 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Asbury v. Brougham, 866 F.2d 1276 (10th Cir. 1989) 15

Bazemore v. Friday, 478 U.S. 385 (1986) ... 22, 25, 26, 27

Beavers v. American Cast Iron Pipe Co., 975 F.2d 792 (11th Cir. 1992) 26

Brown v. American Honda Motor Co., 939 F.2d 946 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992) 15, 16, 17, 25

Cannon v. Teamsters & Chauffeurs Union, 667 F.2d 173 (7th Cir. 1981) 17

City of Richmond v. Croson, 488 U.S. 469 (1989) 28

Crawford v. Western Electric Co., 745 F.2d 1373 (11th Cir. 1984) 15

Delaware State College v. Ricks, 449 U.S. 250 (1980) 22

Forsberg v. Pacific Northwest Bell Telephone Co., 840 F.2d 1409 (9th Cir. 1988), *cert. denied*, 502 U.S. 1058 (1992) 25

General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982) 15, 24

Giles v. Ireland, 742 F.2d 1366 (11th Cir. 1984) 17

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 25

Guinn v. United States, 238 U.S. 347 (1915) 20

Harpring v. Continental Oil Co., 628 F.2d 406 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981) 22

Harrison v. Container Corp. of America, Civ. No. 90-T-016-N (M.D. Ala. 1990) 20, 21

Hazelwood School District v. United States, 433 U.S. 299 (1977) 22, 28

TABLE OF AUTHORITIES – Continued

Page

Houston v. Benttree, Ltd., 637 F.2d 739 (10th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981)..... 15

Mayor v. Educational Equality League, 415 U.S. 605 (1974)..... 27

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)..... 15, 16, 25

Meyers v. Ford Motor Co., 659 F.2d 91 (8th Cir. 1981)..... 15, 20

Mitchell v. Jefferson County Board of Education, 936 F.2d 539 (11th Cir. 1991)..... 26

Myers v. Anderson, 238 U.S. 368 (1915) 20

Patterson v. McLean Credit Union, 491 U.S. 164 (1989)..... 15, 16

Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994)..... 28

Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563 (7th Cir. 1989)..... 15

Suggs v. Container Corp. of America, Civ. No. 7058-72-P (S.D. Ala. 1974) 20, 21, 22

Teamsters v. United States, 431 U.S. 324 (1977)..... 20

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 16

Webb v. Indiana National Bank, 931 F.2d 434 (7th Cir. 1991) 26

Zaklama v. Mount Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988), *cert. denied*, 502 U.S. 1058 (1992) 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1982 ..... 1, 13, 14, 15, 24, 27

Fed. R. Evid. 401 21

Fed. R. Evid. 403 21

Fed. R. Evid. 408 21

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

A racially diverse jury found, after a week of trial, that JSC's Brewton Woodlands Division did not intentionally discriminate against Littles on the basis of race when JSC declined to enter into a supplier contract with him. [App. at 42a-43a] The jury reached this verdict after thorough instruction by the trial court regarding the law applicable under 42 U.S.C. §§ 1981 and 1982.[2] The United States District Court for the Southern District of Alabama denied Littles' post-verdict motions and entered judgment for JSC. [*Id.* at 44a-47a]

On appeal, the United States Court of Appeals for the Eleventh Circuit Court held *per curiam* that Littles' appeal of the denial of his motion for judgment as a matter of law was frivolous, "given the evidentiary record in this case." [*Id.* at 2a] The Eleventh Circuit also rejected Littles' arguments that the district court had abused its discretion in excluding evidence proffered by Littles, and affirmed the district court's denial of Littles' motion for a new trial. [*Id.*]

---

[2] Although Littles states that the district court rejected instructions proffered by Littles that would have permitted the jury to consider Littles' claims of "perpetuation of past discrimination," Littles does not identify what instructions he proffered that would have supposedly accomplished this purpose. [Petition at 8] Furthermore, Littles made no objection at trial with respect to any such purported jury instruction, and thus did not preserve any such alleged issue for appeal.

STATEMENT OF THE CASE

I. JSC USES A DEALERSHIP SYSTEM TO ACQUIRE PULPWOOD AND DOES NOT CONTRACT DIRECTLY WITH WOOD PRODUCERS LIKE LITTLES.

A. How the Dealership System Operates

JSC's Brewton Woodlands Division must consistently supply JSC's Brewton Mill, a separate division of JSC, with approximately 2,000 cords (300 to 400 loads) of pulpwood per day, as necessary for the Mill to produce paper products. [R.6. 447-51, 530]

In order to meet its pulpwood needs, JSC Woodlands contracts with suppliers or "dealers," who function as wholesalers, for wood that the dealer sells. The dealer, in turn, contracts with "producers" who, like retailers, either sell wood they have purchased to the dealer or who cut and haul timber the dealer has purchased. Most wood dealers have subcontracts with a number of producer crews that usually work for a single dealer. A typical producer, like Littles, operates with a single four- to nine-man crew. [R.5. 240-41, 262; R.6. 663, 713, 731, 737, 836, 843-44]

Contrary to Littles' characterization, "producers" do not become "dealers" simply by virtue of their designation as such by a paper mill. [Petition at 3, 6] Instead, dealers and producers perform two fundamentally different functions in the supply chain. Producers' essential function is cutting down trees and delivering wood as subcontractors to dealers. Dealers act as "middlemen" for

the goods and services of others, and their essential function is brokering the purchase and sale of the wood that is harvested by producers. In addition, dealers' activities include the building of logging roads, bridges, and culverts; financing equipment and timber purchases for producers; acquiring and marketing timber; coordinating and supervising the logging done by producers under subcontract; coordinating delivery to buyers; and maintaining inventory either as standing timber that the dealer has already purchased and is ready to be cut or timber that has been cut and is stored in woodyards that are owned or leased by the dealer. [R.6. 458-60, 476-77, 495-98, 818-20]

Furthermore, the business character of the operations of dealers is fundamentally different from that of producers. Dealers are independent, competitive businesses that contract with several different paper companies at the same time. A dealer's ability to attract a number of customers insures that the dealer will have other outlets for its wood if, for example, one of the mills with which the dealer contracts closes or temporarily limits its wood consumption during repairs or maintenance. [R.6. 774]

The operation of a dealership requires considerably more capital than running a production crew. Hundreds of thousands of dollars can be put at risk in a single transaction, and no return can be expected on such an investment for months or years. [R.6. 460, 477, 694, 767] In contrast, the producer gets paid as the producer's work is done, carries no "float," and takes no market risk if, as is usual, the producer is paid a predetermined price for each cord of wood he produces. [R.6. 477-78] Dealers

generally pay their producers at the end of each week, or as the producer delivers wood to buyers. [R.6. 643, 769][3]

B. JSC's Business Reasons for Relying on the Dealership System.

The jury in this case heard testimony from JSC's procurement manager, eight dealers, an expert in the timber procurement area, and a successful producer regarding the advantages of the dealership system for supplying a pulp and paper mill reliably and economically. Their testimony established that the dealership system is responsive to market conditions and avoids centralization of administrative and operational responsibilities, burdens, and costs.

Their testimony also established that, if JSC contracted directly with the 250 roundwood producers that currently haul pulpwood to JSC, rather than contracting with its current 35 to 40 roundwood dealers, JSC would have to hire (and pay) ten times the number of its current employees to perform the forestry, road-building, accounting, payroll, clerical, and administrative operations currently performed by dealers more efficiently and effectively than a paper company can with its own employees. [R.6. 431, 471-72, 580-82, 700-01, 723-24,

---

[3] Littles' allegation that he must "pay" a commission to dealers who sell the wood he hauls to JSC is false. [Petition at 5 & n.4] In fact, dealers make their profits by paying producers less than the dealer receives from the wood buyer, similar to how profits are made any wholesale-retail arrangement, and producers do not "pay" money to dealers for the wood they haul under contract with the dealer. [R.5. 200-01]

765-769] Instead of spreading the cost of such operations among a number of dealers and the various paper companies to which those dealers sell wood, JSC would have to pay for all such operations for all producers hauling wood to JSC. JSC would have no more "middlemen" to assume responsibility for a steady supply of wood to the Mill from producers with varying degrees of reliability. JSC, rather than dealers, would have to maintain the numerous woodyards necessary to inventory wood for use when the flow of wood direct from the woods is inadequate due to bad weather or equipment failure. JSC, rather than dealers, would have to insure compliance by each such small producer with applicable Environmental Protection Agency, Alabama Department of Environmental Management, and other legal, insurance, and forestry standards, and demands for timely payment to producers and landowners. JSC, rather than dealers, would have to handle complaints from and defend lawsuits by landowners and others regarding the logging practices and operations of small producers. [R.6. 467-68, 471, 495-98, 717, 723-24, 767-70, 774-75, 839-40]

C. JSC Makes Supplier Contracts Only with Firms Already in Business as Dealers.

JSC does not make wood supplier contracts with businesses that are not already in business as dealers, nor does it enter into supplier contracts with persons who, like Littles, operate as producers. [R.5. 442; R.6. 463-64] Neither does JSC contract with any business that moves as little roundwood volume as Littles does. [R.6. 487-88]

JSC's business judgment to contract only with dealers has proven through the years to be well-founded. Many companies that have tried to operate without a dealership system have abandoned such attempts, have been forced to pay more for their wood supply, or have found it necessary to supplement their wood supply with wood purchased from wood dealers [R.5. 228-30; R.6. 724, 743-44, 769-70, 836-37].

D. JSC's Policy of Limiting Contracts to Suppliers Already in Business as Dealers Has an Equal Impact on Blacks and Whites.

In recent years, higher equipment and insurance costs, as well as the need for greater efficiency, have caused JSC to rely increasingly on dealers with larger operations and capacities. [R.5. 244-46; R.6. 475-76, 479-80, 775-76, 813, 815-17] JSC was able to reduce its own overhead costs by contracting more with larger dealers and, thus, reducing the number of dealers with which JSC did business. [R.6. 479-80]

Since the early 1980's, JSC's Brewton Woodlands Division has refused to enter into supplier contracts with at least 35 producers (only two of whom were black). [R.6. 483-87] Most of the producers who were refused contracts run larger operations than Littles does. [R.6. 487] In addition, the 23 white-owned companies already in business as dealers, with which JSC also refused to contract during the same time period, includes several companies that move over 2,000 cords of roundwood each week. [R.6. 485]

During that same time period, as a result of its consolidation of its supplier contracts with larger dealers, JSC terminated the contracts of approximately 45 roundwood dealers, all of which were white-owned businesses and were larger than Littles' business. [R.6. 482-83] As a result of JSC's policy of limiting its supplier contracts to larger dealers, the number of JSC's roundwood suppliers was reduced from 65 in 1984, to less than 40 by the time of trial. [R.6. 478-79]

When JSC was dealing directly with a larger number of businesses, JSC purchased wood chips from several chipmills owned by black persons. [R.6. 562-63] There are, however, no black persons currently in business as dealers in the Brewton area. [R.5. 189] At the time of trial, there were only two or three black producers in the Brewton area. [R.5. 227, 247]

E. Littles Is Not a Wood Dealer.

Littles is a producer, not a dealer. [R.5. 121, 230-31; R.6. 745-46] Littles asserted at trial, as he does in his Petition, that the dealer's role is only "nominal" with respect to the procurement and sale of the wood he produces, because Littles purchases his own timber resources rather than having a dealer perform the procurement function for him. [Petition at 5] The overwhelming evidence was to the contrary, and established the variety of other functions performed by the dealer, as well as the business economies inherent in JSC's dealership system, as described above. In any event, there was

no evidence that JSC has made or would make an exception to its "dealers only" policy for a white producer, even if that producer bought 100% of his pulpwood.

F. JSC's "Dealers Only" Policy Does Not Prevent Littles from Going into Business as a Dealer.

Littles' assertion that JSC "froze" dealer contracts in 1979 and now contracts only with businesses formed prior to that time is false. [Petition at 5-6] Instead, the evidence at trial established that JSC made thirteen new roundwood supplier contracts during the relevant statute of limitations period, some of which did not even exist prior to 1979. For example, the jury in this case heard testimony from the owner of Mobile Forest Products, a company that was established in 1984. The owners of Mobile Forest Products mortgaged everything they had in addition to raising $175,000 from an investor, and currently have $2.4 million invested in the company. [R.6. 811, 829-30]

Similarly, Littles' assertion that dealerships are usually acquired through inheritance within white families is false. [Petition at 6 & n.8] In fact, the jury in this case heard testimony regarding a variety of ways in which dealerships may be acquired or formed, including by expansion of logging operations like Littles'. [R.6. 546-48, 694-95, 721-22, 834-35] For example, Carter Pulpwood was purchased in 1968 for $20,000. [R.6. 674-75] Bracewell & Grant was purchased in 1964 for $25,000, with a subsequent purchase of woodyards for $100,000 in 1967. [R.6. 720-21] Branco Wood Products was purchased for about $100,000 in 1975. [R.6. 849] Littles' failure to establish,

buy, or expand into a dealer business is not JSC's responsibility. The simple fact is that, unlike the dealers who testified at trial, Littles has never risked the capital necessary to buy or start a dealership. [R.5. 250]

II. JSC HAS NOT CONTRACTED WITH ANY BUSINESS THAT IS SIMILARLY SITUATED TO LITTLES' BUSINESS.

Throughout this litigation and at trial, Littles identified Claude Alford as the best "comparator" in his efforts to prove that JSC made pulpwood purchase contracts with less qualified suppliers than himself. [R.1. #22 at 2, #40 at 2, #46 at 3-4; R.2. #69 at 11-12; R.5. 223-24, 307, 315-16] The undisputed evidence established, however, that during the period when he was still in business as a producer, Alford tried repeatedly and unsuccessfully to obtain a supplier contract from JSC. Like Littles, Alford was repeatedly refused a supplier contract. Then, in 1986, Alford bought Tri-State Timber Co., a dealership that already had a supplier contract with JSC, investing over $130,000 from profits from his logging business to finance the purchase. [R.6. 505-06, 508, 634, 636]

Tri-State's supplier contract with JSC was already at least two years old when Alford bought the company in 1986. [R.6. 501-04] At the time of Alford's purchase, Tri-State had an established annual wood flow of about $2.5 million worth of timber [R.6. 503], skilled foresters on the payroll [R.6. 638], supplier contracts with several pulp and paper companies [R.6. 62930], three longwood crews, several shortwood crews [R.6. 639], and two woodyards [R.5. 394-95].

Even before Alford's acquisition of Tri-State in 1986, Alford's operations and capacities as a producer were demonstrably superior to those of Littles. Alford's average weekly wood volume during the five years prior to his acquisition of Tri-State in 1989 was about three times what Littles was producing at that time. [R.6. 506-07; DX 21 & 22] Littles' gross receipts in 1986, when Alford acquired Tri-State, were less than half of Alford's. [R.5. 323-24; DX 31 & 32] Littles' equipment is old and in frequent need of repair, and was worth less than one tenth (1/10) of the value of Alford's equipment prior to his acquisition of Tri-State. [R.5. 294-95; DX 21 & 27] Furthermore, Alford's acquisition of Tri-State dramatically increased his production capacity. [R.6. 511-12]

Littles has only one logging crew of five to six employees [R.5. 240-41, 262], produces longwood, rather than shortwood [R.6. 517], and produces mostly pine, rather than hardwood [R.6. 498-99, 517]. His production averages 150 cords per week [R.5. 261-62, DX 15], about 90 cords of which is pulpwood [R.6. 516, DX 15]. Littles only operates locally in the Brewton area [R.5. 296], and has no business relationships with landowners in other areas of the state where hardwood primarily grows. [R.5. 300-01] Practical considerations of landowner relationships and transportation time and costs limit a producer's ability to produce outside a 30- to 50-mile radius of his base of operations. [R.5. 166, 295-01; R.6. 543-44, 668, 682, 845-46]

Furthermore, unlike typical dealers, Littles does not employ any professional foresters to take responsibility for pricing and purchasing wood on a full-time basis.

[R.5. 268, 402; R.6. 476] Littles' testimony at trial demonstrated that he is unfamiliar with the skills and tools used in "cruising timber" to estimate its value and submit competitive bids. [R.5. 268-71; R.6. 463] Littles is also unfamiliar with the Alabama Forestry Association's "Best Management Practices," which timber professionals must follow in Alabama for conservation and ecological reasons. [R.5. 276; R.6. 459, 474-75] Littles' liability insurance, without which he cannot operate as a producer, has been repeatedly canceled for non-payment of premiums, including on one occasion only a month before trial. [R.5. 335-40]

The jury in this case heard testimony from eight dealers with which to contrast Littles' qualifications. For example, Bracewell & Grant has 35 office employees and three foresters on its payroll. Its volume is from 1,500 to 1,900 cords per week. [R.6. 713-16] Southern Timber produces 2,000 cords per week using eight crews. [R.6. 738] Mobile Forest Products produces 6,000 cords per week using ten crews. [R.6. 811-12] Branco Wood Products produces 800 cords per week and maintains six months' timber inventory using three longwood crews and six shortwood crews. [R.6. 849-51]

The evidence established that all of the thirteen supplier contracts made by JSC during the statute of limitations period from October 1989 until the date of trial were with established dealers (rather than producers like Littles), which had qualifications and capabilities neither possessed nor even claimed by Littles. Each of those thirteen dealers had demonstrated ability to buy timber outside the Brewton area where there is a higher concentration of hardwood, and to deliver short hardwood by

rail or long hardwood to JSC's outlying woodyards for slashing. [R.6. 454-55. 488-99] All maintained timber inventory in their own woodyards. [R.6. 497-98] Each of these thirteen dealers has a total pulpwood volume much greater than Littles'. [R.6. 488-97, 591-97; DX 17-20 & 31]

Littles' volume is also much lower than the volume of many of the suppliers with which JSC has refused to contract. [R.6. 487] For example, the owner of Conecuh Timber Co. testified that he has a volume of 4,000 cords per week using ten crews, and that he has been turned down repeatedly for a JSC supplier contract. [R.6. 834-39]

As noted earlier, Littles wants to produce roundwood in the Brewton area. JSC has not made any contracts for the delivery of truckwood direct to the mill in Brewton, as Littles seeks to do, during any period relevant to this lawsuit. [R.6. 544] Nor has JSC made a contract for the delivery of primarily pine pulpwood, the species that Littles primarily produces because of his location. [R.6. 517, 545] None of the thirteen dealers that JSC added during the several years prior to trial is based within a 60-mile radius of Brewton, and JSC did not even consider any new dealers in the Brewton area. [R.6. 488, 546]

SUMMARY OF ARGUMENT

Littles' Petition for Certiorari is based on premises that falsely portray the facts and law at issue in this case. Specifically, Littles' characterization of JSC as a company that "froze" its contracts prior to 1979, intentionally excluded blacks from such contracts prior to 1979, and now only contracts with dealerships and the white heirs

of dealerships with which it contracted prior to 1979, is unrecognizable from the record. In fact, the evidence at trial established that JSC made new supplier contracts during the relevant time period with thirteen established dealerships. Each such dealership had capabilities that Littles does not have and does not even argue that he has. The evidence at trial also established that Littles has never risked the capital necessary to buy, start, or expand into the type of large, competitive dealership company with which JSC exclusively contracts.

Furthermore, Littles did not proffer any evidence whatsoever that would have been probative of "past intentional discrimination" by any corporate division of JSC in the making of wood supplier contracts or in any other respect. On the contrary, the uncontroverted evidence at trial affirmatively demonstrated that JSC's Brewton Woodlands Division contracted directly with black-owned businesses for the purchase of wood products prior to implementation of its policy of reducing the total number of its supplier contracts in the mid-1980's. Accordingly, Littles' challenge to the district court's holding that claims of "perpetuation of past discrimination" are not actionable under 42 U.S.C. §§ 1981 and 1982 is not only legally unfounded, it also raises issues that are not even presented by this case.

In addition, the "evidence" of "past discrimination" excluded by the district court consisted of Littles' proffer of (1) testimony alleging past discrimination by the Southern pulp and paper industry, in the form of an affidavit which did not even mention JSC, by a historian with no familiarity with JSC's contracting practices; (2) testimony by a black producer that a paper mill unrelated

to JSC had refused him a supplier contract; and (3) testimony regarding two dissimilar lawsuits brought by Littles' attorney against a separate division of JSC, both of which were settled with no admission of discrimination. The district court's exclusion of this "evidence" was properly based on considerations of relevance, prejudice, undue delay, waste of time, and the potential for jury confusion.

Finally, the law applied by the district court and the Eleventh Circuit in this case does not present any conflict with the decisions of this Court or of other federal circuits, or any question of federal law that has not been settled by this Court. Instead, Littles' arguments in this respect are based on comparisons of false characterizations of the holdings below with cases addressing questions that are not at issue in this appeal, and on citations to voting rights and school desegregation cases decided under Constitutional standards that are not applicable to this case under 42 U.S.C. §§ 1981 and 1982.

ARGUMENT

I. THE DECISIONS BELOW WERE CONSISTENT WITH AND COMPELLED BY APPLICABLE LAW.

In Section I of his Argument, Littles cites various historical and statistical sources regarding the importance of the timber industry to the Southern economy. [Petition at 9-15] Based on these citations Littles argues that the timber industry is "significant," but does not (and cannot) identify any *legal* issue raised by this case that is

"significant," as appropriate to warrant review by this Court.

Indeed, Littles' Petition does not even address the law that is applicable to this case under 42 U.S.C. §§ 1981 and 1982, as set out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058 (1992); *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989); *Crawford v. Western Electric Co.*, 745 F.2d 1373, 1376 (11th Cir. 1984); *accord Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563 (7th Cir. 1989); *Meyers v. Ford Motor Co.*, 659 F.2d 91 (8th Cir. 1981); *Houston v. Benttree, Ltd.*, 637 F.2d 739 (10th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981). Under these cases, a plaintiff is required to prove *intentional* discrimination to prevail in an action under 42 U.S.C. §§ 1981 and 1982. *See also General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

A. Littles Failed Even to Establish a Prima Facie Case of Intentional Discrimination.

Littles is not a wood dealer. Instead, Littles' only business is and always has been as a "producer." The only dealers that JSC contracted with during the relevant period prior to this action were large, established dealerships with particular qualifications and capabilities that met specific needs of JSC in terms of species of product, location outside of the Brewton area, and/or mode of delivery. The undisputed evidence established that Littles had *none* of these qualifications. Accordingly, Littles did

not meet even the minimum qualifications for a contract with JSC, and Littles failed to establish even a prima facie case of discrimination. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989); *Zaklama v. Mount Sinai Medical Center*, 842 F.2d 291, 293 (11th Cir. 1988)), *cert. denied*, 502 U.S. 1058 (1992).

B. JSC's Standards for the Selection of Its Wood Dealers Are Legitimate and Nondiscriminatory.

Even if Littles had been able to establish a prima facie case, JSC established legitimate nondiscriminatory reasons for its decision not to contract with him. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981); *Brown*, 939 F.2d at 949. The evidence was overwhelming that JSC's policy of contracting only with dealers and for not contracting with Littles (even if he had been in business as a dealer) was both rational and nondiscriminatory.

C. JSC's Reasons For Not Contracting with Littles Are Not Pretexts For Discrimination.

As demonstrated by the evidence at trial and described above, a comparison of Littles' qualifications with those of the dealers with which JSC contracts does not support Littles' claims of pretext. In particular, Littles alleged throughout the pre-trial proceedings and at the trial of this matter that Claude Alford, the owner of Tri-State Timber Co., is the dealer most comparable to Littles.

As established by the evidence at trial, however, any similarity between Littles' operations and Alford's ends with the facts that they both work in the timber industry and that, before Alford acquired an existing dealership business, both were denied supplier contracts by JSC.

Furthermore, the equal impact of JSC's policies on whites precludes a finding of pretext. JSC's selection criteria have resulted in refusals of supplier contracts to at least 58 white-owned businesses and only 2 black-owned businesses. In addition, JSC *terminated* 45 roundwood dealerships from 1984 to 1991, and the total number of roundwood dealerships declined from 65 to only 40. Most of these terminated dealerships had qualifications superior to those of Littles, and *all* were white-owned businesses. "It is difficult to hold that a practice which affects applicants of all races in the same manner is actually designed to conceal a racially discriminatory motive." *Brown*, 939 F.2d at 952 (citing *Giles v. Ireland*, 742 F.2d 1366, 1375-76 (11th Cir. 1984) (hiring criteria which affect both blacks and whites equally are not discriminatory); *Cannon v. Teamsters & Chauffeurs Union*, 667 F.2d 173, 176-77 (7th Cir. 1981) (same)).

II. THE ELEVENTH CIRCUIT'S DECISION RAISES NO ISSUE THAT WARRANTS REVIEW BY THIS COURT.

A. Littles Did Not Proffer Any Evidence of Historical Discrimination by JSC in the Making of Supplier Contracts.

Littles asserts that the courts below never addressed his contention that JSC had "an intentionally discriminatory policy of selecting only whites as dealers" prior to

1979. [Petition at 6] Based on this assertion, Littles makes the ludicrous argument (without citation to authority) that his contention of such a past policy of discrimination "must be assumed to be true" for the purposes of his Petition for Certiorari. [*Id.*] In fact, the reason the courts below never addressed this allegation was because Littles never proffered any evidence to support it.

Indeed, the only evidence on the issue of JSC's historical contracting practices demonstrated that prior to the 1980's, when JSC was dealing directly with a larger number of wood suppliers, JSC contracted directly with several black businessmen for the purchase of wood products. [R.6. 562-63] Accordingly, not only was there no evidence that JSC had "a past policy of discrimination," the uncontroverted evidence affirmatively demonstrated that JSC did *not* have an intentionally discriminatory policy or practice with respect to its supplier contracts.

Thus, the factual linchpin upon which all of Littles' arguments in his Petition depends simply does not exist. Since Littles never proffered any evidence whatsoever that JSC had a past policy of discrimination with respect to its supplier contracts, Littles' arguments that the trial court erroneously excluded such evidence, that JSC has an affirmative obligation to eliminate the effects of such a past policy, and that such a past policy warrants ignoring the fact that Littles is utterly unqualified for a supplier contract with JSC, raise issues that are not presented by the facts of this case, in addition to being legally unfounded.

B. Littles' New Argument That JSC Relies on a "Grandfather Clause" Is Not Supported by the Evidence Presented or Proffered at Trial.

Littles argues in his Petition that JSC's "dealers only" policy since the mid-1980's amounted to a "freeze" imposed by JSC on new supplier contracts "at some point prior to 1979." [Petition at 5-6] Based on this new and unsupported allegation, Littles argues that JSC's dealership system "assures with almost mathematical precision" that blacks "will never even be considered for one of its dealer contracts." [*Id.* at 12 & 14]

This is the first time in this lawsuit that Littles has relied on this characterization of JSC's dealer-selection policies. Giving Petitioner the benefit of the doubt, this new characterization, made for the first time to this Court, appears to be based on a misapprehension by Littles' new counsel of the testimony at trial. [*See id.* at 5-6 (citing "Tr. 442, 464, 578")] At the cited pages, JSC's wood procurement manager testified that JSC has a policy of contracting only with companies *in business as* wood dealers. There is *no* evidence that JSC has ever had a policy of restricting its contracts to companies that had a contract with JSC or another pulp and paper company prior to 1979. In fact, the uncontroverted evidence at trial demonstrated that JSC entered into thirteen new supplier contracts during the relevant statute of limitations period, including with companies that were not even established until after 1979.

Accordingly, Littles' argument that the JSC's "dealers only" policy amounts to an "infamous grandfather clause" of the type addressed in inapplicable voting

rights cases decided by this Court in 1915, *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915), is entirely without factual foundation in the record in this case. [*See* Petition at 12, 20-21 & n.40]

C. The Settlements of Employment Discrimination Lawsuits Against Separate Corporate Divisions of JSC Are Irrelevant to Littles' Claim of Contractual Discrimination by JSC's Woodlands Division.

As noted above, Littles offered no evidence to controvert the fact that JSC's Woodlands Division has never had a policy of excluding blacks from consideration for a supplier contract and has contracted with black-owned businesses for the supply of wood products. Instead, Littles proffered evidence at trial regarding two lawsuits previously brought by Littles' attorney against a separate corporate division of JSC, both of which were settled without any admission of discrimination by JSC. [Petition at 13 & n.27] *See Harrison v. Container Corp. of America*, Civ. No. 90-T-016-N (M.D. Ala. 1990); *Suggs v. Container Corp. of America*, Civ. No. 7058-72-P (S.D. Ala. 1974). The *Suggs* case relied on a disparate impact theory to challenge JSC's seniority system at its Brewton Mill.[4] The *Harrison* case also was a Title VII employment discrimination case, and challenged promotion practices at the Mill.

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[4] Significantly, the disparate impact theory relied on by the plaintiffs in the *Suggs* case was specifically rejected by this Court four years after the settlement. *See Teamsters v. United States*, 431 U.S. 324 (1977).

The central issue in this case is whether JSC's Woodlands Division intentionally discriminated against Littles in declining to make a wood supplier contract with him. Accordingly, the trial court concluded that evidence of unproven claims resolved in the *Suggs* and *Harrison* settlements would inject issues relevant to unintentional employment discrimination (including "disparate impact" theory) that are not relevant in this case alleging intentional contract discrimination, relative to persons not involved in this case, against a separate corporate division of JSC, and with regard to alleged discriminatory actions that are dissimilar to those alleged in this case, and would confuse the issues and mislead the jury. *See Fed. R. Evid.* 403 (relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

In addition, evidence of unproven *claims* of employment discrimination asserted and resolved the *Suggs* and *Harrison* lawsuits against the *Brewton Mill* would not make Littles' allegation in this case that he was discriminated against by the *Woodlands Division* in the making of supplier contracts any more or less probable. Accordingly, such evidence was irrelevant and inadmissible. *Fed. R. Evid.* 401; *cf. Fed. R. Evid.* 408 (evidence regarding settlement is not admissible to prove liability for the claims settled). Accordingly, the district court excluded evidence regarding the existence and settlement of both cases, but allowed limited testimony regarding the employment practices at the Mill that were contemporaneous with Littles' solicitations of a supplier contract with the Woodlands Division. [App. at 31a-32a]

The district court also excluded evidence regarding employment practices by JSC in its separate Mill division in the 1960's. [App. at 32a] In particular, Littles proffered testimony by a Mill employee that no blacks worked in certain Mill departments in 1966. [R.5. 87-88] This proffered testimony of alleged employment discrimination in job assignment by a separate corporate division of JSC addressed conditions that were conclusively remedied by a settlement that Littles' attorney agreed to twenty years ago. The class action consent decree in the *Suggs* case specifically provided that "[c]ompliance with this Decree shall be deemed compliance with Title VII and 42 U.S.C. § 1981 with respect to said individuals and said class." *Cf. Hazelwood School District v. United States*, 433 U.S. 299, 309-10 n.15 (1977) ("[Evidence of historical discrimination] might in some circumstances support the inference that such discrimination continued, *particularly where relevant aspects of the decision-making process had undergone little change.*") (emphasis added); *accord Bazemore v. Friday*, 478 U.S. 385, 402 (1986).

In addition, allowing such evidence would have potentially prejudiced the jury and would have delayed the trial and wasted the district court's time by forcing JSC to respond with lengthy rebuttal evidence just as though it were trying allegations of discrimination that, if they ever had any foundation at all, have long since been resolved. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) (the purpose of limitations periods is to "protect employers from the burden of defending claims arising from employment decisions that are long past"); *Harpring v. Continental Oil Co.*, 628 F.2d 406 (5th Cir. 1980) (district court properly excluded relevant testimony

where evidence "would involve trying another lawsuit within the existing lawsuit"), *cert. denied*, 454 U.S. 819 (1981).

D. The District Court's Rulings With Respect to Littles' "Evidence" of Discrimination in the Pulp and Paper Industry as a Whole Were Within the Court's Discretion.

Littles also relies in his Petition on cases alleging unintentional "disparate impact" discrimination in employment that were filed in the 1960's and 1970's against pulp and paper companies other than JSC. [Petition at 13 & n.25] "Evidence" regarding the cases cited by Littles was not proffered at trial, and, obviously, would properly have been excluded on grounds of relevance had it been offered.

The "evidence" of "past discrimination" by the pulp and paper industry as a whole that was proffered by Littles at trial consisted of (1) expert testimony regarding "historical" discrimination by the Southern pulp and paper industry that did not even mention JSC as a participant in such discrimination or otherwise [App. at 32a-33a; R.2. 66; R.5. 9-11, 279-89; R.6. 804; CX 1], and (2) testimony by a black producer that a paper mill unrelated to JSC had refused him a supplier contract [R.6. 747-48]. Again, Littles proffered no evidence whatsoever to rebut the fact that JSC had contracted with black-owned businesses for the supply of wood products prior to implementation of its policy of contracting with a fewer number of larger dealers. This evidence affirmatively

demonstrated that JSC did *not* have a history of discrimination with respect to its supplier contracts.

The district court's exclusion of Littles' proffered "evidence" was properly based on considerations of relevance, prejudice, undue delay, waste of time, and the potential for jury confusion. [App. at 32a-33a; R.6. 747-48] The confusion and waste of judicial time and resources inherent in the presentation of evidence regarding Littles' allegations against the entire pulp and paper industry, in the context of this lawsuit alleging intentional discrimination by JSC's Woodlands Division, are apparent. Even the strongest possible evidence of discrimination by other companies would not be probative of discrimination by JSC, and would have tended to confuse and mislead the jury into thinking it could find intentional discrimination by JSC based on even unintentional discrimination by another company.

E. This Case Presents No Conflict with Decisions of this Court or of Other Circuits.

Littles argues that the district court erred in holding that his allegation of JSC's "knowing perpetuation of past discrimination" failed to state a claim under §§ 1981 or 1982, and that this holding was "flatly inconsistent with reported decisions of this Court and of the other courts of appeal." [Petition at 7 & 16] On the contrary, the precedent is well established that Littles' "knowing perpetuation" claim is a "disparate impact" claim that is not actionable under 42 U.S.C. §§ 1981 and 1982. *E.g., General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375 (1982) (plaintiff must prove intentional discrimination to

establish a violation of § 1981); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 953 (11th Cir. 1991) ("[I]t is not sufficient to show that the defendant was aware that the particular practice would have a discriminatory impact. Instead, *the plaintiff must show that the defendant chose the policy for precisely this purpose.*" (emphasis added); citing *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988)), *cert. denied*, 502 U.S. 1058 (1992). *Compare Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("disparate impact" model of proof addresses practices challenged under Title VII that are "neutral on their face, and even neutral in terms of *intent*," but that have the incidental effect of disadvantaging blacks to a greater degree than whites) (emphasis added), *with McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("disparate treatment" model of proof addresses *intentional* discrimination).

Littles attempts to circumvent these well-settled principles with a convoluted interpretation of *Bazemore v. Friday*, 478 U.S. 385 (1986), and the district court's analysis of that decision in this case. [Petition at 16-17] Contrary to Littles' mischaracterization, the district court did not state that Littles' claims would be compelling if *Bazemore* were applicable. [*Id.* at 16 (citing App. 26a)] Instead, the district court stated at the cited page that Littles' claims would be more compelling if this were a disparate impact case, without citation to *Bazemore*.

Littles also describes several decisions of various circuit courts of appeals that have followed *Bazemore* as "flatly inconsistent with" the lower courts' decisions in this matter. [Petition at 17-19 & nn.28-39] Each of the cited cases involves the "continuing violation" theory

that has been developed, based on *Bazemore*, to address statute-of-limitations defenses in discrimination cases and to allow consideration of otherwise time-barred evidence in cases where the "continuing violations" theory applies. *Bazemore*'s "continuing violation" theory is not at issue in this appeal. On the contrary, the jury in this case found in favor of Littles with respect to JSC's statute-of-limitations defense. [App. at 42a]

Furthermore, the cases cited by Littles are entirely consistent with Eleventh Circuit law. Like the cases cited by Littles as "flatly inconsistent," the Eleventh Circuit applies the "continuing violation" theory both in cases alleging unintentional and intentional discrimination. *Compare, e.g., Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796-97 (11th Cir. 1992) (applying "continuing violation" theory in disparate impact case), *with Mitchell v. Jefferson County Board of Education*, 936 F.2d 539, 548 (11th Cir. 1991) (applying "continuing violation" theory in Equal Pay Act case alleging intentional discrimination). Indeed, one of the decisions cited by Littles as "flatly inconsistent with" Eleventh Circuit law has been specifically *followed* by the Eleventh Circuit. *See Beavers*, 975 F.2d at 796 (following *Webb v. Indiana National Bank*, 931 F.2d 434, 438 (7th Cir. 1991)). [*See* Petition at 17-18 & nn.30 & 33] Accordingly, Littles' purported conflict among the circuits is not only irrelevant, it is non-existent.

In any event and as noted above, the only "evidence" proffered by Littles of "past discrimination" that JSC allegedly "knowingly perpetuated" consisted of vague testimony regarding discrimination in the pulp and paper

industry *other than* by JSC's Woodlands Division. In contrast, the evidence offered in *Bazemore* related to discrimination by the *same* employer at issue. Accordingly, Littles' garbled characterization of *Bazemore* would not make Littles' proffered "evidence" admissible or his legal arguments defensible, even if that characterization were accurate.

F. The Fourteenth and Fifteenth Amendment Cases Cited by Littles Are Irrelevant to this Lawsuit.

Instead of discussing the many cases decided under 42 U.S.C. §§ 1981 or 1982, which are dispositive of this case, Littles cites a number of school desegregation and voting rights cases that arise under the fourteenth and fifteenth amendments. [Petition at 19-20] The analyses applicable to suits alleging such invidious, unconstitutional, state-sponsored violations of civil rights are completely different from those applicable to suits alleging violations of §§ 1981 and 1982 by private businesses.

Specifically, "qualifications" are not relevant in the school desegregation and voting rights cases cited by Littles. Individuals are "fungible" for the purposes of determining whether they have a constitutional right to vote or to receive an education. In cases such as this, however, it cannot be assumed "that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded." *Mayor v. Educational Equality League*, 415 U.S. 605, 620 (1974). "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than

to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *City of Richmond v. Croson*, 488 U.S. 469, 501-02 (1989) (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977)); *see also Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553 (11th Cir. 1994). Given that no blacks in the Brewton area are even in business as wood dealers, let alone "qualified" under JSC's standards, the constitutional standards relied on by Littles would not affect the outcome of this case, even if such standards were applicable.

CONCLUSION

Littles' Petition does not and cannot identify any issue that would warrant review by this Court. Instead, Littles cites inapplicable cases and fabricates a controversy among the circuit courts of appeal that does not exist and would not be presented by this case even if it did exist. Accordingly, Littles' arguments in his Petition to this Court are no less frivolous than the Eleventh Circuit found Littles' arguments to be in the proceedings below.

For all the foregoing reasons, Respondent Jefferson Smurfit Corporation (U.S.) respectfully requests this Court to deny Herbert Littles' Petition for Certiorari.

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No. 95-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HERBERT LITTLES,

Petitioner,

v.

JEFFERSON SMURFIT CORPORATION (U.S.),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities . . . . . *i*

Petitioner's Reply to Respondent's Brief in Opposition to Certiorari 1

Conclusion 9

Table of Authorities

Cases:

Conley v. Gibson, 335 U.S. 41 (1957) 5

Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987) 2n

General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) 2

Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987) 2n

Hishon v. King & Spalding, 467 U.S. 69 (1984) . . . 5

Miree v. DeKalb County, 433 U.S. 25 (1977) 5

Scheuer v. Rhodes, 416 U.S. 232 (1974) 5

Statutes:

42 U.S.C. §§ 1981, 1982 . . . . . 1, 7, 8

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

1.

Although Respondent advances a flurry of *factual* arguments, it expressly acknowledges that the decisions of the courts below actually rested on a *legal* determination: a "holding that claims of 'perpetuation of past discrimination' are not actionable under 42 U.S.C. §§ 1981 and 1982" (Br. Op. 13). As it admits, "the district court . . . h[eld] that [Petitioner's] allegation of [Respondent's] 'knowing perpetuation of past discrimination' *failed to state a claim* under §§ 1981 or 1982" (*id.* at 24) (emphasis supplied). Whether this holding was correct is precisely the issue which Petitioner asks this Court to decide; Respondent's formulation of the issue decided below is essentially the same as the first Question Presented in the Petition (Pet. i).

The Petition sets forth half a dozen decisions of this Court holding, under various circumstances, that perpetuation of past intentional discrimination violates the Fourteenth or Fifteenth Amendments (Pet. 19-21). Respondent does not dispute our characterization of these decisions, nor deny that the allegations in the instant case would state a claim if the paper mill in question had been operated by the State of Alabama rather than by a private corporation. Instead, Respondent defends the lower court rulings on the same mistaken legal premise relied on by the courts below, arguing that the legal standard under §§ 1981 and 1982 is different from the constitutional standard embodied in the Fourteenth and Fifteenth Amendments:

> The analyses applicable to suits alleging . . . invidious, unconstitutional, state-sponsored violations of civil rights are *completely different*

> from those applicable to suits alleging violations of §§ 1981 and 1982 by private businesses.

(Br. Op. 27) (emphasis supplied.) *See also id.* at 14 ("Constitutional standards are not applicable to this case under 42 U.S.C. §§ 1981 and 1982"). This was the very position adopted by the trial court (*see* Pet. App. 26a).

But that holding and argument are flatly inconsistent with this Court's teaching in *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389-91 (1982):

> [T]he origins of [section 1981] can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870. Both of these laws, in turn, were legislative cousins of the Fourteenth Amendment . . . . The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself. . . . Although congress might have charted a different course in enacting the predecessors of § 1981 than it did in proposing the Fourteenth Amendment, we have found no convincing evidence that it did so.[1]

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[1] *Accord, e.g., Demery v. City of Youngstown*, 818 F.2d 1257, 1260 (6th Cir. 1987); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 120 (3d Cir. 1985), *aff'd*, 482 U.S. 656 (1987).

2.

Respondent asserts (Br. Opp. 18) that

> the factual linchpin upon which all of Littles' arguments in his Petition depends simply does not exist. Since Littles never proffered any evidence whatsoever that JSC had a past policy of discrimination with respect to its supplier contracts, Littles' arguments . . . raise issues that are not presented by the facts of this case, in addition to being legally unfounded.

This contention is both misleading and incorrect.

In the first place, it overlooks the fact that five months before the trial took place, the district court had held that Petitioner's "knowing perpetuation" contentions failed to state a claim and that Petitioner could not present them at trial. In denying Petitioner's motion for partial summary judgment,[2] the court held that it

> need not even determine whether there are any material disputed factual issues with respect to plaintiff's motion for partial summary judgment since the legal claims are not relevant in the instant action. As discussed above, if he is to prevail in this case plaintiff must prove that the defendant intentionally discriminated against him. *Plaintiff cannot prove intentional discrimination by either theory of proof proposed in his motion for*

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[2]Petitioner moved for partial summary judgment on the "knowing perpetuation" claims, "(1) that [Respondent]'s current practices perpetuate past and present intentional segregation of [Respondent]'s business environment and (2) that [Respondent]'s criteria for awarding dealerships 'lock in' the effects of [Respondent]'s historical discrimination" (Pet. App. 24a-25a).

> *partial summary judgment.* If these theories tend to prove anything, they prove discriminatory impact, which is not actionable under either § 1981 or § 1982.

(*Id.* at 25a) (emphasis supplied.) Then, at Respondent's behest, the court ruled that evidence tending to show "historical" discrimination by Respondent in awarding dealer contracts could not be introduced even on the narrower issue whether Respondent's most recent decision not to extend a dealership contract to Littles was "intentionally discriminatory." In granting, in part, Respondent's motion *in limine*, the court interpreted *Bazemore* to stand for the proposition that "evidence of pre-Act discrimination was relevant to show that it continued, not to show that the continuation of the discrimination was intentional" (Pet. App. 31a; *see id.* at 32a-33a).

Under these circumstances, it is frivolous for Respondent to complain about the quantum of evidence of its historic discriminatory dealer contract practices introduced or proffered at trial; as the district court remarked during the hearing (addressing Respondent's counsel), "you very artfully or forcefully caused me in your argument, and I think correctly, to close [the door] on [evidence of perpetuation]" (Tr. 283).[3]

Second, it is untrue that Petitioner "never *proffered* any evidence whatsoever that [Respondent] had a past policy of discrimination with respect to its supplier

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[3]Indeed, when Petititioner again sought to argue the "knowing perpetuation" claims in his post-trial motion for equitable relief, Respondent suggested that sanctions should be awarded against Petitioner. *See* Pet. App. 44a-45a.

contracts" (emphasis supplied). It is correct that, faced with the district court's rulings on his motion for partial summary judgment and the Respondent's motion *in limine*, Petitioner did not attempt a comprehensive evidentiary presentation of the "knowing perpetuation" claims. But Petitioner did in fact make a proffer of evidence that is probative of historical discrimination in the timber industry in Alabama, of which Respondent is a part (Pet. App. 39a-41a). The trial court, as requested by Respondent, refused to consider that evidence.

Finally, Respondent's attack on the factual sufficiency of Petitioner's "knowing perpetuation" claims is simply premature. As explained above, the question presented by the rulings in this case is whether the courts below erred in holding as a matter of law that Petitioner's "knowing perpetuation" allegations "failed to state a claim under §§ 1981 or 1982" (Br. Opp. 24). In determining that legal issue, well-pleaded factual allegations are assumed to be true, *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (same); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (same). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims," *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

3.

Preclusion of Petitioner's opportunity to present evidence that, in the past, Respondent itself participated in an industry-wide practice of restricting dealerships to whites limited Petitioner's ability to respond to the company's factual defense even on the narrow question of its current motives for refusing to give Petitioner a dealer contract. Although Petitioner performs all the functions

of a wood dealer, procuring 100% of his wood directly from landowners, cruising the timber, negotiating its sale to various markets, building roads as necessary, hiring crews to cut the wood, paying their insurance and workmen's compensation, etc. (Tr. 121-23, 147-49, 456-60), Respondent argued to the jury, as it does in this Court, that Petitioner's business is not as large as that of most dealers with paper mill contracts (Br. Opp. 5, 7). But Petitioner cannot expand his business without access equal to that of other dealers to the pulpwood market within 30 to 50 miles of his Brewton area timber base, as Respondent concedes (*id.* at 10). Yet as Respondent tells this Court, "during the several years prior to trial," it has not even considered increasing the number of its Brewton area dealers (*id.* at 12). The question before this Court is whether the lower courts committed legal error by refusing to allow Petitioner to prove that this all-white dealer monopoly is directly traceable to Respondent's own racially discriminatory practices prior to 1979.

4.

As we set out in the margin, even the erroneously constricted evidentiary record made below does not support the factual assertions set out in the Brief in Opposition.[4] At this point in the proceedings, however,

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[4]For example, Respondent suggests that few, if any, of its currrent dealerships are held by the children of its pre-1979 dealers. But Respondent's Procurement Manager tesified that one "common way [new dealers] obtain [a dealership] is through inheritance . . . . Many times a son will come into an operation that his father had previously been operating a dealership and his son will take over the business" (Tr. 548). Respondent cites three examples to suggest that individuals now routinely become dealers by buying existing dealerships (Br. Opp. 8). But two of the cited instances are acquisitions that occurred in the 1960's (Tr. 674, 720-21), when

factual arguments are premature. Petitioner is not seeking a ruling from this Court that the evidence he presented was sufficient to establish a "knowing perpetuation" claim actionable under 42 U.S.C. §§ 1981

(Petitioner alleges) Respondent refused to permit blacks to become dealers in any fashion, and the third example is in fact that of a firm inherited by the son of one of the original 1941 co-owners of the dealership in question (Tr. 849).

Respondent also asserts that subsequent to 1987 it "made thirteen new roundwood *supplier contracts*" (Br. Opp. 8, 13, 19) (emphasis supplied). Respondent's Procurement Manager explained at the trial that these thirteen *contracts* were "different" from the dealerships at issue in the litigation (Tr. 585). Some were "one time shot" contracts to buy a single lot of wood from a firm located far from Brewton (Tr. 489 (Carter Pulpwood; "no ongoing relationship"), 493 (Southern Timber; "a one tract deal"), 493-94 (Wire Grass Pulpwood; after one transaction, "we ceased doing business")). In a number of instances the firms receiving these contracts were dealers for other paper mills operated by Respondent outside of Brewton (Tr. 497 (firms that "regularly do business" with Respondent's Georgia mills)). Several of the one-time contracts were simply arrangements to swap wood with other major paper mills (Tr. 412-13 ("a number of those were wood swaps"), 494). At least one of the contracts was to buy wood that was owned by International Paper but which had mistakenly been delivered by a railroad to Respondent's Brewton mill (Tr. 418-19, 495-96). *None* of the firms with which Respondent made these thirteen contracts were minority-owned.

Finally, Respondent asserts that the Brewton mill "contracted directly with black-owned businesses for the purchase of *wood products*" (Br. Opp. 13 (emphasis supplied); *see also id.* at 18, 20, 23). However, Respondent conceded that it had never contracted directly with any black-owned firm to buy the roundwood which it uses to manufacture paper (Tr. 562). The transaction cited in the Brief in Opposition is a single instance prior to 1984 in which Respondent purchased "wood fuel," a reference to wood chips sold to the Brewton mill by a black-owned mill in Lowndes County (Tr. 562-63).

and 1982. Petitioner seeks only the opportunity to *present and try* such a claim to a jury empaneled in the United States District Court for the Southern District of Alabama. Nothing that Respondent says in the Brief in Opposition changes the fact that Petitioner was prevented from making that claim by the district court's legal ruling about the scope of §§ 1981 and 1982.

As we demonstrated in the Petition, that ruling is important; it is inconsistent with decisions of this Court and of other Courts of Appeals; it is erroneous; it affects a major industry in the southern United States; it will deny to many African-Americans the legal redress that Congress intended they should have to eliminate the legacy of past discrimination whose effects continue to this day; and it merits review by this Court.

Conclusion

For the foregoing reasons as well as those set forth in the Petition, a writ of certiorari should issue to review the judgment of the court below.

Respectfully submitted,

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